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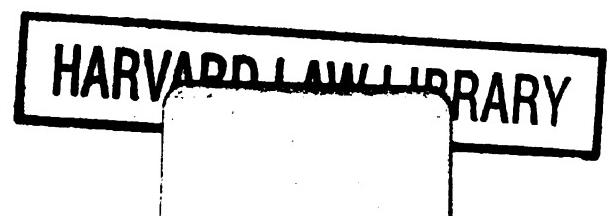
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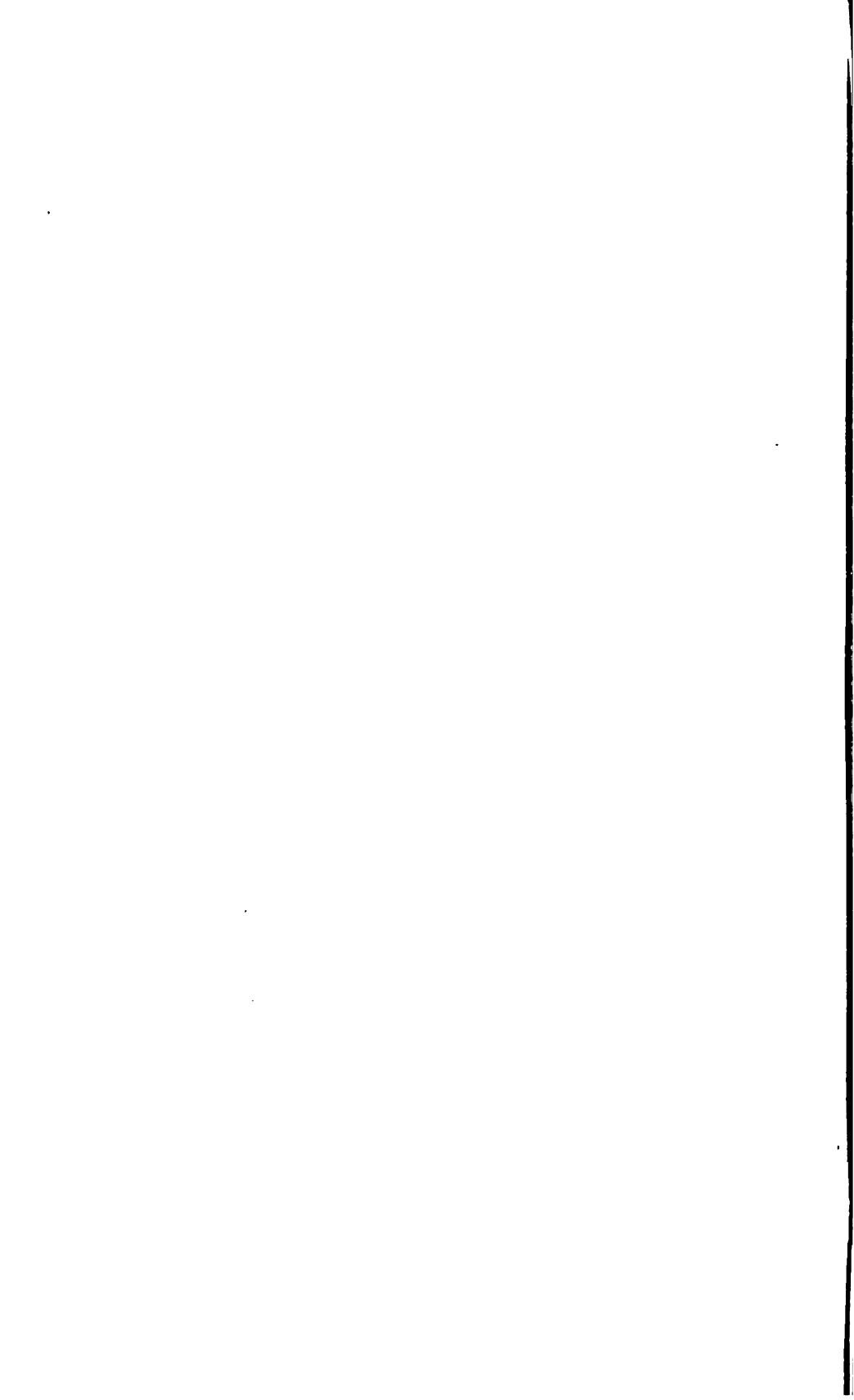
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*The 1st
Franklin 1816.*

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REPORTS
OF
C A S E S

ADJUDGED IN THE

COURT OF CHANCERY

OF
NEW-YORK.

BY WILLIAM JOHNSON,
Counsellor at Law.

VOL. I.

CONTAINING THE CASES FROM MARCH, 1814,
TO DECEMBER, 1815, INCLUSIVE.

ALBANY:
PUBLISHED BY E. F. BACKUS, STATE-STREET.
1816.

Southern District of New-York, ss.

BE IT REMEMBERED, that on the thirteenth day of July, in the forty-first year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases adjudged in the Court of Chancery of New-York. By William Johnson, Counsellor at Law. Vol. I. Containing the Cases from March, 1814, to December, 1815, inclusive."

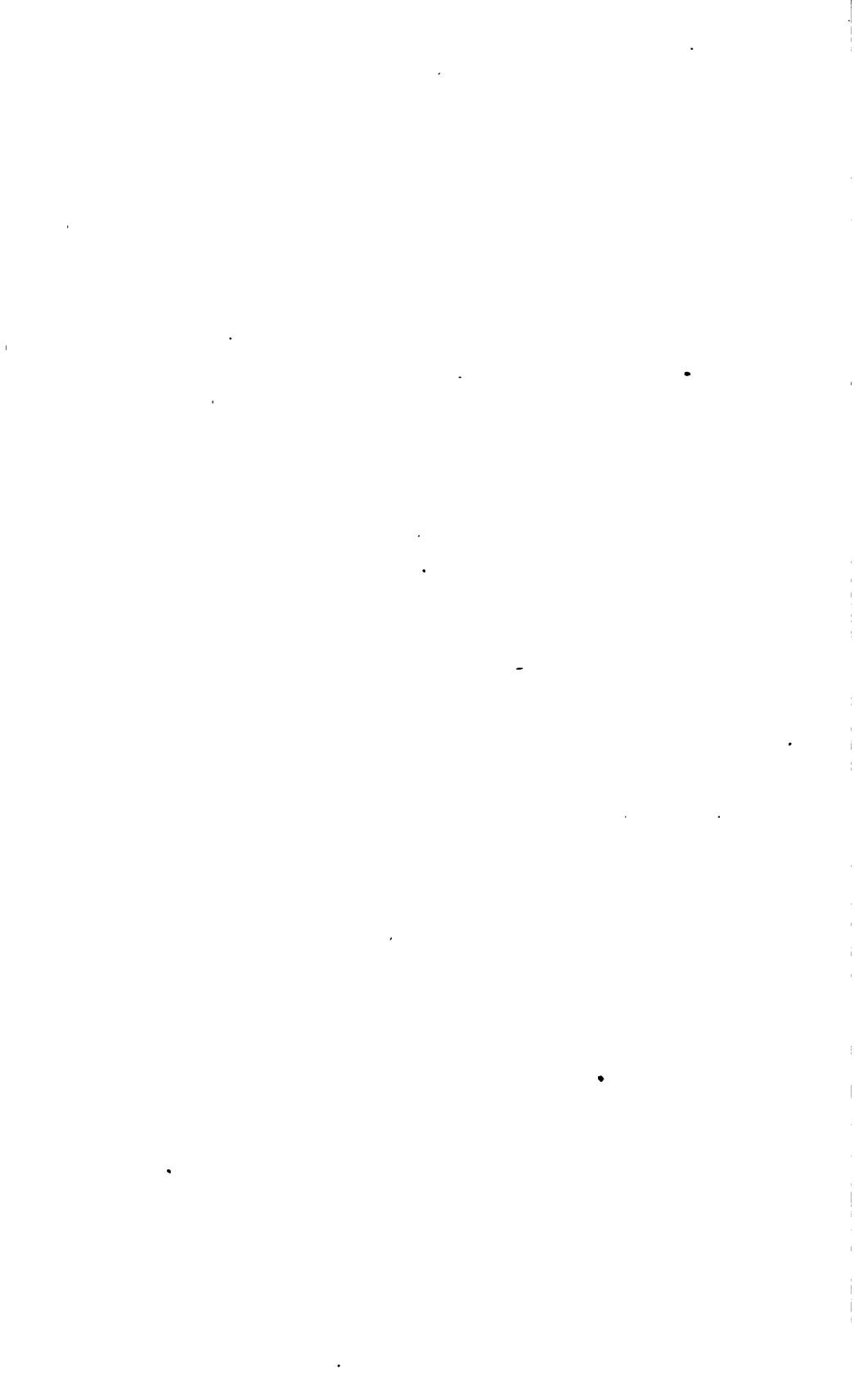
In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

HERON RUDD,
Clerk of the Southern District of New-York.

Recd. Sept. 26, 1870.

NAMES
OF THE
CHANCELLORS OF THE STATE OF NEW-YORK,
Since 1776.

ROBERT R. LIVINGSTON, Esq. appointed *October 17, 1777.*
JOHN LANSING, Jun. Esq. appointed *October 28, 1801.*
JAMES KENT, Esq. appointed *February 25, 1814.*



PREFACE.

The system of *Equity* forms a most valuable portion of that noble inheritance of Law and Liberty derived from our ancestors. A Court of Equity, as distinct from the Courts of Law, is to be found in the earliest records of our juridical history. It was one of the first acts of the *Assembly*, after the people of the colony were admitted to a share in the legislative power, to declare that there should be a COURT OF CHANCERY, which should hear and determine all matters of *Equity*, and be esteemed the Supreme Court of the Colony.*

Though the *Governor* and his Council refused to concur with the Assembly, it was not owing to any difference of opinion between them, as to the necessity or utility of such a court.† The erecting of a Court of Chancery, afterwards, by an *ordinance* of the 2d September, 1701, to consist of the *Governor* and *Council*, rendered it extremely unpopular; and frequent, but fruitless attempts were made by the Assembly to destroy the Court. It continued to be held under that *ordinance*, though little business appears to have been

* Vid. *Smith's Hist. of New-York*, (Carey's Ed.) 87, 88, 112, 113.

† “A court of equity,” says *Smith*, (*Hist. of New-York*, 274, 276,) “is absolutely necessary; but whether private property ought to be in the hands of the Governor, I leave it to others to determine.”

In 1752, the officers of the Court were two masters, two clerks, one examiner, a register, and a sergeant at arms.

transacted in it until its organization, in *March*, 1778, under the *Constitution of the State*. Since that period the business of the Court of Chancery has continued to increase, and it has enjoyed, equally with the other Courts, the public confidence and favour.

That its decisions should not before have been made public in an authentic and durable form, has been matter of surprise, considering the spirit of public discussion and freedom of inquiry which pervade every branch of our government, and which require that every thing that concerns the community should not only be generally known, but fully understood.

By an act of the legislature, passed the 13th *April*, 1814, it has been made "the duty of the reporter, from time to time, to report and publish such decisions of the Court of Chancery, as the Chancellor of the State shall deem of sufficient importance to be reported and published." In compliance with this direction, the present volume has been prepared with all the diligence and attention prompted by the respect due to a command emanating from such high authority.

The plan of works of this nature has been too long established by usage, and sanctioned by general approbation, to permit any attempt at innovation. In extracting from voluminous pleadings and proofs, the facts of each case, it has been the endeavour to be as concise as possible, consistently with that perspicuity so essential to the easy and right understanding of the judgment of the court. Some apology or explanation may be expected

for the almost entire omission of the arguments of counsel. Though considerations of personal convenience might have been sufficient to prevent that steady and constant attendance on the court, indispensable for that purpose ; yet the omission has not been owing to a wish to avoid any labour or exertion, however severe and arduous, which might be necessary to a faithful performance of duty. It has been the result of a deliberate judgment, confirmed by the opinion of persons entitled to very great respect, and which, if necessary, might be supported by the highest legal authority. It is certainly to be regretted that so much learning and eloquence as are often displayed in the argument of causes, should be, in a great measure, lost ; but works of this kind are not adapted to their entire preservation, and they must suffer much mutilation by the process of abridgment. As, in the course of time, also, these judicial annals become, unavoidably, voluminous, the convenience of the profession seems to require that every thing not essential to the main object of such histories should be omitted : and in the present instance, it is hoped that any omission of this sort, will be less felt, from the very full discussion and examination of all the points and authorities, by the Court, in pronouncing its decision. These judgments are given exactly as they were delivered in writing, so that all danger of error or misapprehension, in this respect, is entirely avoided. In them is to be found all that is valuable in these reports, which are now offered to the profession, for whose use they are principally intended, with that hope of a favourable reception from its candour and libera-

lity, which the indulgence so long shown to the author naturally leads him to entertain.

To each case is prefixed an abstract of the points decided ; and a copious *Index* is subjoined to the work, by which every point may, by an easy reference, be found. As soon as the number of cases decided shall be sufficient for the purpose, a second volume will be prepared and published without delay.

NEW-YORK, September 6, 1816.

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In Chancery, June 20, 1816.

Ordered, That whenever a defendant shall cause his appearance to be entered, but shall not cause his answer to be filed in due time, an application may thereupon be made to the Chancellor (without previous notice) by petition, stating the circumstances, for an order, that the defendant answer the plaintiff's bill in such time, after service of a copy of the order for that purpose, as the Chancellor shall direct, or, in default thereof, that the bill be taken *pro confesso*. And, if the defendant shall not answer within the time limited by such order, a rule for taking the bill *pro confesso* may be entered, as of course, on filing an affidavit of the service of a copy of the said rule.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW-YORK.

JAMES KENT, Esq. CHANCELLOR.

SEYMOUR *against* HAZARD.

A WRIT of *ne exeat republica* cannot be granted for a debt due and recoverable *at law*. It is applied only to equitable demands. And it seems that it must not only be an equitable demand, but one in the nature of a debt actually due.

1814.

SEYMOUR
v.
HAZARD.

March 3.

THE bill, which was for a *ne exeat*, and sworn to, March 3, 1814, stated, that the defendant, on the 22d of October, 1813, purchased of the plaintiff a house and lot of ground in *Hillsdale*, for 3,300 dollars, and for which he gave the plaintiff seven promissory notes, and a mortgage on the premises to secure the payment; that possession of the premises was immediately given to the defendant; that one of the notes would become due on the 15th of April next; that on the 20th of January last, the defendant clan-

CASES IN CHANCERY.

1814. destinely left the premises, having put another person, a poor man, in possession ; that the defendant declared that he was about to remove out of the state, and did not mean to pay the notes. It was also stated, that the defendant owed the plaintiff more than thirty dollars, and secreted himself to avoid the process of law issued for the recovery of that sum. The plaintiff prayed a writ of *ne exeat*, that the defendant be compelled to give security, in the sum of 7,000 dollars, not to leave the state.

SEYMOUR.
v.
HAROLD.

E. Williams, for the plaintiff.

THE CHANCELLOR. The writ of *ne exeat* cannot be granted for a debt due and recoverable at law. As a general rule, it is applicable only to equitable demands. (*Dickens's Rep.* 82. 154. 503. 609. *Amb.* 75. 2 *Aik.* 210. 10 *Vesey*, jun. 165.)

This objection applies equally to the debt of thirty dollars as to the demand on the notes ; and there is a further objection to granting the writ, as it respects the notes, that none of them appear to be due ; and there must be not only an equitable demand, but one in the nature of a debt actually due. (*Cook v. Ravie*, 6 *Vesey*, jun. 283.) (a)

(a) Vide *Shafroe v. Shafroe*, (7 *Vesey*, jun. 171.) *Jones v. Sampson*, (8 *Vesey*, jun. 593, 594.) *De Manderville v. De Manderville*, (10 *Vesey*, jun. 63.) *Haffey v. Haffey*, (10 *Vesey*, jun. 261.)

1814.
GENET
v.
TALLMADGE.

March 18.

*The Children of E. C. Genet, by him, as their guardian,
against Tallmadge, administrator, &c.*

A father, who has been appointed *guardian* to his infant children, by the court, and has given competent security under the act, (sess. 36. c. 75.) and approved security to account to his children, on their coming of age, is entitled to receive legacies and distributive shares belonging to them. But as father, or guardian, *by nature* merely, he would not be allowed to receive legacies, &c. belonging to his children.

PETITION for the payment, to the father, as guardian to his children, of the sum of 17,166 dollars and 76 cents, already paid into court, by the defendant, as administrator of *George Clinton*, deceased, for and on account of the distributive share of that estate due the petitioners, who are minors. The father (*E. C. Genet*) was appointed guardian to his children by this court, in September, 1812, and gave the security required.

Van Vechten, (attorney-general,) for the petition.

T. A. Emmet, contra, on behalf of the administrator.

THE CHANCELLOR. There is one objection to the demand of the petitioner, which must prevail. The statute of sess. 36. c. 75., (1 N. R. L. p. 314.) declares that every person entitled to any legacy or distributive share, shall, at the time of payment or delivery, give bond in double the sum demanded, with two sufficient sureties, to the executor or administrator, to refund, &c. if assets should fail for the payment of debts, &c. No such bond is tendered, and the application, on that ground, must fail.

But if this objection be removed, (as it probably may,) the petitioner, in his character of *guardian*, is entitled to

CASES IN CHANCERY.

1814. <sup>GENET
v.
TALLMADGE.</sup> the money, though in his character of *father*, or guardian by nature merely, it seems that he would not be. There has, however, been considerable doubt and discussion in the books, even on this point: how far a legacy due to minors could be safely paid by the executor to the father of the legatees: but the better opinion is, that the payment would be at the risk of the executor. The oldest case I have met with, on this subject, is that of *Holloway v. Collins*, (1 Ch. Cas. 245.) in which the Lord Keeper held, that a payment, by the executor, of a legacy to the father of an infant legatee, was a good payment, though the father afterwards became insolvent. But as it appeared that the executor had taken a bond of indemnity, he was held, in that case, to have paid at his own peril. Afterwards, in the case of *Strickland v. Hudson*, (3 Ch. Rep. 88.) it was said, that the Master of the Rolls would never allow a child's legacy to be paid to the parent, upon any security whatever; and yet, in that case, on a bill against the executor, by the father, as next friend and guardian, his children's legacy was decreed to be paid to him, on his giving security to pay over the same when his children came of age. The case of *Dagley v. Tolferry* (1 P. Wms. 285. 1 Eq. Cas. Abr. 300. pl. 2. *Gilbert's Eq. Cas.* 103.) has been referred to, in the late cases, as a leading one on this point. It was there decided, by Lord Chancellor *Cooper*, that the payment, by the executor, of a legacy to the father of a minor was ill, and the executor was decreed to repay the legacy, under circumstances of extreme hardship, and after the father had become bankrupt. The Lord Chancellor seemed to consider it as a rule of the court, that the parent was not to receive the children's legacies, though he was, by nature, guardian to his children. But this case was questioned by Lord *Hardwicke*, in *Philips v. Pagel*, (2 Atk. 80.) and he said that the rule was there laid down too strictly; that in all cases where executors pay infants' legacies to fathers, they shall be paid over again. In *Cooper v. Thornton*,

CASES IN CHANCERY.

5

(3 Bro. 96. 186.) the Master of the Rolls observed, in allusion to the above cases, that, in early times, the payment to the father of a legacy to the child was held good, but that since *Dagley v. Tolferry*, the idea of the court had been otherwise. He said that the rule was laid down very harshly in that case, though he did not mean to interfere with the doctrine; and he decided the case before him upon its special circumstances; but the counsel referred to a decision in the exchequer, in 1786, in the case of *Cunningham v. Harris*, in which the rule was declared to be firmly settled, that a legacy to an infant cannot safely be paid to the father.

1814.

GANNETT

v.

TALLMADGE.

In all these cases, the question seems to have been, whether a legacy to a minor could safely be paid to the father, as *father*, or natural guardian merely, and it does not appear to be anywhere denied, that a *guardian*, duly appointed by the competent authority, was authorized to receive legacies and distributive shares belonging to his ward. On this point, I do not see that any doubt can arise. The statute of this state, to which I have already referred, contemplates a recovery at law, by the guardian, of legacies and distributive shares, on giving approved security to account to the infant on his coming of age. A guardian is, by the general nature of his trust, entitled to the possession and care of the personal, and of the rents and profits of the real estate of the infant; and I do not feel myself at liberty to deny to the guardian, on any terms whatever, the possession of this distributive share.

But it appears that the security given by the petitioner, when appointed guardian, is not quite adequate; and, though his claim may be imposing, when we consider that he unites the characters of natural and of legal guardian, yet I think the security must be increased to, at least, 10,000 dollars more, before the petition can be granted.

Let it therefore be referred to a master, to ascertain and report proper and competent security to the administrator,

CASES IN CHANCERY.

1814. under the statute, and additional security to the infants, to the amount of, at least, 10,000 dollars, and all further direction is, in the mean time, reserved.

HINE
v.
HANDY.

HINE *against* HANDY.

A creditor is not allowed to make it a *condition* of a loan, that he shall receive a *compensation for his services* in procuring the money: and if the amount of such compensation is included in the security given for the loan, the court will, on the debtor's paying into court the amount reported to be due by a master, after deducting the sum charged for such services, grant an injunction to stay any proceedings on the mortgage.

BILL for an injunction to stay the sale on two mortgages, under a power of sale contained in them. The plaintiff deposited with the register the amount which he admitted to be due. The bill charged *usury*, but which was denied in the answer. It appeared, from the answer, that the plaintiff had agreed to pay the defendant for his trouble and expenses, in going from Oneida county to Schoharie, to procure the money loaned; and that the amount of this compensation was liquidated, and agreed to by the parties, at 15 dollars, which sum, with 4 dollars and 25 cents for the trouble of the defendant in going to Utica to see the writings executed, was included in the first bond and mortgage. The expense of the writings was also included. And in the second bond and mortgage, a similar charge of 1 dollar and 25 cents, for the trouble of the defendant, was included.

THE CHANCELLOR. The bill charges usury in the bonds and mortgages, and the charge is denied in the answer, and the consideration of the bonds and mortgages fully set forth.

The proof exhibited by the plaintiff is not sufficient to countervail the answer.

The only question is, whether the court ought to permit the charge of 19 dollars and 25 cents, included in the first bond, for time and expenses of the defendant in procuring the money, to stand. And the same point arises as to the 1 dollar and 25 cents included in the second bond.

1814.

HINE

V.

HANDY.

This court is always jealous of collateral demands and advantages claimed by a creditor, as a condition of the loan of money. They have a tendency to usury and oppression. On this ground it is, that a mortgagee cannot originally stipulate for a collateral advantage, as that the interest, if not paid at the end of the year, shall be converted into principal, or that the mortgagee shall be a receiver of the rents and profits, with a commission. (*Chambers v. Goldwin*, 9 *Vesey*, jun. 271. *Scott v. Brest*, 2 *Term Rep.* 238.) The actual expenses of the writings ought to be paid. But to allow the creditor to make it a condition of the loan, that he shall receive a compensation for his services, in procuring the money, and to include that compensation in the security, is against sound principle, and tends, most manifestly, to oppression and usury, if it is not usury in itself.

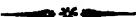
The amount of the sum here charged is of no moment; but the principle involved is important. I shall, therefore, decree, that it be referred to a master to ascertain the amount of the bonds, after deducting 19 dollars and 25 cents from the original sum in the condition of the first bond, and 1 dollar and 25 cents from the original sum in the condition of the second bond; and that, on the plaintiff's paying into court sufficient to make up the amount in addition to the sum already deposited, an injunction issue.

September 3, 1814. Afterwards, on the coming in of the master's report, a question was raised as to the costs; and

The costs of the defendant were, however, ordered to be paid by the plaintiff, in the bill filed for the injunction.

CASES IN CHANCERY.

1814. his honour *Ordered*, that the plaintiff pay to the defendant his costs, to be taxed, together with the amount reported by the master to be due to the defendant.
CAINES
v.
FISHER.



April 25. CORNELIA CAINES, by her next friend, GEORGE CAINES, against FISHER & M'LACHLAN.

If a defendant, after an appearance, will not answer, the bill will be taken *pro confesso*. Where the bill is for relief only, and states sufficient ground, it is not necessary to prosecute a party to a contempt and sequestration, before taking the bill, *pro confesso*.

If, after appearance, no answer is put in, according to the rules of the court, the defendant will be ordered to file his answer by the first day of the next term, or that, on proof of service of the order, the bill will be taken *pro confesso*.

THIS was an application to the court, by petition, that the commissions issued to take the answers of the defendants, in *England*, be returned, in a short time, or that the bill, as against them, be taken *pro confesso*.

The bill was filed on the 30th of *July*, 1808; an appearance was entered by the two defendants, being aliens resident abroad, on the 23d of *November*, 1808, by *Mulligan*, as their solicitor. It was alleged that notice of this appearance was served on the plaintiff's solicitor; but the knowledge of the fact was denied.

On the 15th of *August*, 1809, an order was granted, that the defendants appear and answer in nine months, or that the bill be taken *pro confesso*, and that the order be published *eight weeks*, in two gazettes. On the 29th of *October*, 1810, the order was made absolute. On the 6th of *November*, 1810, on the petition of the solicitor of the defendants, commissions were granted to take the answers of the defendants, one of whom resided in *London*, and the

other in the island of *Bermuda*, and the commissions were ordered to be returned without delay.

On the 25th of *February*, 1811, the order of the 29th of *October*, 1810, for taking the bill *pro confesso*, was vacated for irregularity : and on the 26th of *August*, 1811, a motion of the plaintiffs, for vacating the two last orders, and for re-establishing the order of the 29th of *October*, 1810, was denied, with costs.

An appeal from the order was brought in *September*, 1811, but afterwards withdrawn.

On the 14th of *March* last, an order of this court was obtained, requiring the defendants to show cause (20 days after personal service of the order on their solicitor) why the order of the 25th of *February*, 1811, should not be set aside, and the original orders, thereby vacated, be restored.

Henry, for the defendants, showed cause.

Caines, contra.

THE CHANCELLOR. If the defendant, after appearance, will not answer, but stands out to a contempt, the bill will be taken *pro confesso*. This is the general rule and practice of the court; (*1 Harris. Ch. Pr.* 274—277.) and it is essential to justice, for otherwise the plaintiff never could have the benefit of his suit ; and, as was observed in the case of *Hawkins v. Crook*, (*2 P. Wms.* 556.) and afterwards by Lord *Hardwicke*, in *Davis v. Davis*, (*2 Atk.* 21.) it is consonant to the rules and practice of courts of law. Lord *Hardwicke* was inclined to think, that after an insufficient, as well as after no answer, a bill might be taken *pro confesso*. There is no doubt of the existence and necessity of the practice, but the *English* course is to prosecute the party to a contempt and sequestration, before the bill is thus to be taken against him by default. I do not, however, perceive any good reason for going this length, before the rule for taking the bill *pro confesso* is granted. If an answer be essential,

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as in bills for discovery, an answer must be compelled by the process for contempt ; but there is no need of this when the bill is for relief, and states sufficient ground. All that is wanting is the admission of the facts ; and if the defendant has appeared, and will not answer, he ought to be concluded in the same manner as he is by a neglect to plead to a declaration at law. The authority of this court to prescribe rules for taking bills *pro confesso*, or to entitle the party to a decree or order by default, is expressly recognised by the statute of 1813, (1 N. R. L. 491.)

In the present case the defendants have had very great indulgence. The bill was filed, and an appearance entered, in 1808, and to this day the plaintiff has been striving to obtain an answer, or for a decree. Any further delay, without some good cause, cannot be permitted. The court has competent power to bring this case to a hearing, and from the authorities referred to, and from the reason of the thing, especially as the defendants are not within the power of the court, I think the proper course would be to take the bill *pro confesso*. There is no reasonable excuse for this delay. A commission to take the answer of the defendants was awarded in 1810 : one of them resides in *Bermuda*, and the other in *England*. We cannot listen to the suggestion that war intervened twenty months afterwards ; and this is the only excuse offered.

I shall, therefore, adopt a rule for this case, and which I mean to apply hereafter to other cases of appearance and no answer ; that the defendants file their answer by the first day of the next term, or, on proof of the due service of this rule, the bill will be taken *pro confesso*.

Rule accordingly.

1814.



KANE
v.
VANDER-
BURGH.

KANE against VANDERBURGH AND OTHERS.

April 26th.

An injunction to stay waste will be granted, though there is no suit pending, and though no action can be maintained against the tenant at law.

THE bill, which was for an injunction to stay waste, stated, that *Abraham Tenbroeck*, being seised in fee of the premises, devised them in fee to his daughter, *Margaret*, who devised them to her sister, *Elizabeth Schuyler*, for life, remainder to her children living at her death, and in default of such children, remainder to the children of her brother, *Dirck Tenbroeck*, in fee. After the death of the two testators, *Elizabeth Schuyler*, and her husband, released her interest to the plaintiff. *Elizabeth* is still living, but without issue; and the defendants are tenants from year to year. The bill further stated, that actions of ejectment were intended to be brought against the defendants, who had been served with notices to quit, which would expire on the 1st May next; and it charged, also, "that the defendants, by themselves, and others hired by them, are daily committing great waste on the premises, by cutting down large quantities of valuable wood and timber, for sale, and carrying the same to market, to the great and irreparable injury of the land, and of the estate of the plaintiff."

No answer had yet been put in to the bill.

Woodworth, for the defendants, now moved to dissolve the injunction, for want of sufficient matter stated in the bill.

Henry, contra.

THE CHANCELLOR. The waste is explicitly and sufficiently charged in the bill to support the injunction. Nor is it essential to this remedy that there should be an actual *lie*

CASES IN CHANCERY.

1814. *pendens* in a court of law. There are numerous cases in chancery, as Lord *Hardwicke* has frequently observed, (*Perrot v. Perrot*, 3 *Atk.* 94. *Robinson v. Litton*, 3 *Atk.* 210. *Farrant v. Lovell*, 3 *Atk.* 723. *Garth v. Cotton*, 1 *Ves.* 556.) in which the court has interposed to stay waste, by the tenant, where no action can be maintained against him at law. Thus, where there is lessee for life, remainder for life, remainder in fee; the mesne remainderman cannot bring waste, nor the remainder-man in fee, but chancery will interpose and stay the waste.

So equity will, in many cases, restrain waste, though the lease contain the clause *without impeachment of waste*, and which takes away the remedy at law, as where this power is exercised in an unreasonable manner, and against conscience. (*Aston v. Aston*, 1 *Ves.* 264. *Strathmore v. Bowes*, 2 *Bro.* 88.)

Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court.

The tenant for life is here suffering injury to his own interest, and he, by his tenants, is doing great injury to the inheritance, which it is his duty to prevent. He is bound to stop the mischief, or be responsible himself. To suppose that an ejectment must be actually commenced before the injunction can issue, is certainly an error; this would be placing the operation of waste beyond the reach of control during the period of the six months' notice. Indeed, the notice to quit may be considered as the commencement of an adverse proceeding at law, and sufficient to bring the case within the spirit of the decision in *Lathrop v. Marsh*, (5 *Ves.* 259.)

Motion denied, with costs.

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CONNECTICUT
 v.
JACKSON.

April 29th.

Interest upon interest, or *compound interest*, is never allowed, unless in special cases; as where there is a settlement of accounts between the parties after interest has become due, or there has been an agreement for that purpose subsequent to the original contract; or a master's report, computing the amount of principal and interest, has been confirmed.

THE report of the master, to whom it had been referred to compute the amount of principal and interest due on the bond and mortgage executed by the defendant, contained a calculation allowing compound interest, or interest upon interest, without any special agreement of the parties, or any settlement of accounts. (a)

(a) The calculation of the master was as follows:

Bond,	\$25,000
Interest to 5th March, 1806,	2,262 50
	<hr/>
	\$27,262 50
1806, March 5th, paid	1,220
	<hr/>
	\$26,042 50
Interest to 11th March, 1806, is 2 months and 6 days,	286 46
	<hr/>
	\$26,328 96
11th March, 1806, payment	834 64
	<hr/>
	\$25,494 32
Interest to the 15th June, 1808, 2 years, 1 month, and 4 days,	3,203 86
	<hr/>
	\$28,698 18
1808, 15th June, payments of May and July,	458 96
	<hr/>
	\$28,239 22
Interest to the 12th October, 1808, being 3 months and 27 days,	550 64
	<hr/>
	\$28,789 86
1808, 12th October, payment	850
	<hr/>
	\$27,939 86
Interest to this day, (April 22, 1814,) 5 years, 6 months, and 10 days,	9,266 61
	<hr/>
Amount due,	\$37,206 47

1814. *Sedgwick*, for the plaintiff, moved that the report be confirmed.

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THE CHANCELLOR. This allowance of compound interest is inadmissible, and the report must be sent back to the master for correction. There are cases in which interest is considered as changed into principal, and permitted to carry interest; as where a settlement of accounts takes place after interest has become due, or an agreement is then made that the interest due shall carry interest, or the principal and interest are computed in a master's report, and the same is confirmed. But, except in some such special cases, interest upon interest is not allowed, and the uniform course of the decisions is against it, as being a hard and oppressive exactation, and tending to usury. Even an original agreement, at the time of the loan or contract, that if interest be not paid at the end of the year, it shall be deemed principal, and carry interest, will not be recognised as valid. Such a provision would not amount to usury, so as to render the contract connected with it illegal and void at law; (*Le Grange v. Hamilton*, 4 Term Rep. 613. 2 H. Black. 144.) but this court, certainly, and, perhaps, a court of law, would not give effect to such a provision.

It will be useful to look into the decisions on this question of compound interest.

As early as the case of *Davis v. Higford*, 4 Car. I., (1 Chan. Rep. 15.,) the court laid down the rule that interest upon interest was not allowed; and that has been the general language of the court of chancery down to this day, with but few exceptions. In *Smith v. Pemberton*, 17 Car. II., (1 Chan. Cases, 67.,) an exception was allowed in favour of the assignee of a mortgage, and the amount of the principal and interest, really and *bona fide* due, and paid by him, was allowed to carry interest. The entire sum was considered as principal. But this case was afterwards overruled in *Potter v. Hubbell*, 24 Car. II., (2 Chan. Rep. 44. 3 Chan.

Rep. 43.,) for it was there decided, by Lord Chancellor *Shaftesbury*, assisted by the Judges *Vaughan* and *Rainsford*, that the assignee of a mortgagee ought not to be in a better condition than the mortgagee, and no interest was allowed but on the original principal sum. Afterwards, in *Macclesfield v. Fitton*, 36 Car. II., (1 *Vern.* 168.,) the Lord Keeper expressed his disapprobation of this precedent, and said that the allowance of interest on interest, in the case of an assignee of the mortgagee, was reasonable. It does not appear, however, that he ventured to overrule it, though, in the subsequent case of *Gladman v. Henchman*, (2 *Vern.* 135.,) such interest was allowed ; and the loose *dicta* in the ancient books are contradictory on the point. (1 *Chan. Cas.* 256. 1 *Freeman's Rep.* 303. 2 *Freeman's Rep.* 142.) Perhaps, therefore, it may be considered as a doubtful question, on the ground of these ancient authorities, whether the assignee of a mortgagee, on a bill to redeem, be not entitled to interest on the whole sum which he paid. Nor are the imperfect cases, in the reign of *Charles II.*, uniform or consistent, even on the general question whether compound interest can be allowed, for the *dicta* are both ways. (2 *Chan. Rep.* 148, *Bradbury v. Bucks.* 2 *Chan. Cases*, 147. *Howard v. Harris.* 1 *Chan. Cases*, 256. *Chamberlain v. Chamberlain.* 2 *Freeman's Rep.* 142. *Anonymous*, in favour of, and 2 *Chan. Cases*, 153. *Ranelagh v. Thornhil*, against such interest.) But those cases are too loose, and imperfectly reported, to be deemed of authority ; and the cases since the *English revolution*, in 1688, have established, beyond controversy, the general rule which has been mentioned, and those cases are so well reported, and have the sanction of such eminent names, as to be entitled to confidence.

In *Chesterfield v. Cromwell*, in 1701, (1 *Eq. Cas. Abr.* 287. B.,) Lord Keeper *Wright* admitted the general rule, that interest could not carry interest, but held that, in some cases, it would be injustice not to regard the interest due as principal ; as where the defendant's mother, with her assent.

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1814. (she being near of age,) stated an account of the interest long in arrears, and the account was fair, and the settlement necessary for the infant's maintenance. In *Brown v. Backham*, 1720, (1 P. Wms. 652.) Lord Chancellor Parker questioned whether, if the mortgagor ever signed an account, admitting so much due for interest, it would make the interest principal, as it did not show an agreement for that purpose, and he thought a writing would be requisite. And in *Waring v. Cudliffe*, (1 Ves. jun. 99.) Lord Thurlow said, that he found the court of chancery in the constant habit of thinking that interest ought not to carry interest, and that he must overturn all the proceedings of that court, if he allowed it. In short, chancery will not allow compound interest, unless where there is the settlement of an account between the parties after the interest has become due; or there has been an agreement for that purpose, subsequent to the original contract, or where the master's report, computing the sum due for principal and interest, is confirmed; for it is then in the nature of a judgment. (*Mosely*, 27. 246. 2 Ves. 471. 1 P. Wms. 652.) The cases and language in the books are clear in acknowledging the rule, that even an agreement made at the time of the original contract, to allow interest upon interest, as it should become due, is not to be supported. (*Lord Ossulston v. Lord Yarmouth*, 2 Salk. 449. Case of *Sir Thomas Meers*, cited in *Cases Temp. Talbot*, 40. and 1 Atk. 304. Lord Eldon, in *Chambers v. Goldwin*, 9 Ves. 271.)

This review of the current of decisions shows the existence of the general principle, and the exceptions and limitations by which it is attended. And though creditors will be very apt to think, with Lord Thurlow, that there is nothing unjust in compelling a debtor, who neglects to pay interest when it becomes due, to pay interest upon that interest, yet the wisdom of our law has ordained otherwise. The Roman law was constant in its condemnation of compound interest. *Nullo modo usuræ usurarum a debitoribus exi-*

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gantur, et veteribus quidem legibus constitutum fuerat, &c.
 (Code 4. 32. 28. *Vetus. Com. ad Pand. lib. 22. tit. 1. pl. 20.*) And it appears to me that this provision in the law is not destitute of reason and sound policy. Interest upon interest, promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to inflame the avarice, and harden the heart of the creditor. Some allowance must be made for the indolence of mankind, and the casualties and delays incident to the best regulated industry; and the law is reasonable and humane which gives to the debtor's infirmity, or want of precise punctuality, some relief in the same infirmity of the creditor. If the one does not pay his interest to the uttermost farthing, at the very moment it falls due, the other will equally fail to demand it with punctuality. He can, however, demand it, and turn it into principal, when he pleases; and we may safely leave this benefit to rest upon his own vigilance or his own indulgence. *Haberus* says, that neither the law of benevolence, nor of public utility, will permit interest upon interest. *Sed lex caritatis et publicae utilitatis non patitur, ut mutuus debitor, qui in mora solvendi usuram ob angustiam rei pecuniarie deprehenditur, nova usura adfligatur, qua re familia ad incitas redigundur; ideoque legibus sub poena infamia prohibetur. Imo nec si consenserit debitor, ut usura commissa in sortem transferatur, vel obligationi principali adjiciatur, licita est usura.*
(Præl. Juris. Rom. lib. 22. tit. 1. 6.)

The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be

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Rule for casting interest, where partial payments are made.

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taken to augment the principal ; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal ; and interest is to be computed on the balance, as aforesaid.

Let the master, therefore, take back the report, and correct the calculation.(a)

(a) Vide *Raphael v. Boehm*, (11 *Vesey*, jun. 93.) In the case of *Lewis' executor v. Bacon's legatee*, (3 *Hening and Mumford's Rep.* 89. 116.,) where an *interest account* was stated, and a balance struck, and carried to the *debit* of the party in a new account, and interest charged on the balance, the supreme court of appeals, in *Virginia*, held it to be *compound interest*, and refused to allow it.

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May 2d.

HAIGHT AND OTHERS *against* DAY AND OTHERS.

Where an act of the legislature, for the incorporation of a bank, appointed certain *commissioners*, for the special and sole purpose of receiving subscriptions, and they were directed "to apportion the excess of shares among the several subscribers, as they should judge *discreet* and proper;" *it seems*, that chancery will not interpose, to stay all proceedings, under the act, by an injunction, on a bill charging that the commissioners, in the exercise of their discretion, acted partially and improperly, where the charge of bad faith is fully repelled by the answer.

It seems, that where a statute gives to certain persons a discretion in a particular case, and for a special purpose, a mistake of judgment, in that case, cannot be reviewed and corrected by the court.

THE bill, on which an injunction had been granted, filed 21st of *May*, 1813, recited the act of the legislature, passed the 26th of *March*, 1813, (sess. 36. ch. 80.,) for the incorporation of the *Catskill Bank*. The plaintiffs were subscribers. All the subscriptions amounted to 36,432 shares. The number of shares to be subscribed, exclusive of those to be subscribed by the bank of *Hudson*, was limited to 6,000 ; and the commissioners were to apportion the

excess among the several subscribers, as they should judge discreet and proper. The bill charged that the commissioners proceeded to apportion the excess, and arbitrarily, and against the consent of *Isaac Dubois*, one of the commissioners, and a plaintiff, assigned the 6,000 shares prescribed by the act, among *themselves*, their *relations*, and *favourites*, &c.; and that the apportionment was made corruptly and fraudulently, &c.; and prayed a discovery, and an injunction from holding the first election under the act.

A supplemental bill was filed the 27th of *May*, 1813, stating, that the defendants had not appeared, nor had the *subpoenas* been served; that the first election of directors had been held under the corrupt distribution of the shares, as stated above, and making the directors parties, and praying an injunction, &c.

The defendants, in their answer, put in on the 16th of *June*, 1813, stated, that the subscription books were opened to all persons, &c.; that the commissioners apportioned the excess, as they judged discreet and proper, according to a schedule annexed to the answer; and they denied that they distributed the shares without the assent of *Dubois*, who subscribed his name to the distribution; but they refused to apportion as he wished, because *S. Haight* was hostile to the incorporation, and the other persons were his connexions and dependants, or poor, or hostile to the institution; and they did believe that there was a combination, by *S. Haight*, and others, to procure a majority of the shares, and suppress the bank, or manage it improperly; and they believed that the apportionment, made by them, was best calculated to promote the interest of the village of *Catskill*, and of the community at large; that after the directors were chosen, the subscription book, and deposite money, were delivered over to the directors, who ordered the cashier to refund the surplus deposites, which he continued to do, until the injunction was served; that two thirds of the whole deposites had been refunded; and certificates of stock were issued to the

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holders for their shares ; and they denied that they were influenced by motives of favouritism, or that they acted from any agreement, or concert, as alleged in the bill, &c.

A motion was now made to dissolve the injunction.

E. Williams, and Van Vechten, for the defendants.

Henry, contra.

THE CHANCELLOR. The bill charges the commissioners with an unjust, fraudulent, and corrupt apportionment of the shares subscribed to the *Catskill Bank*. The shares, exclusive of those to be subscribed by the bank of *Hudson*, were limited to the number of 6,000, and there were subscribed 36,432. The commissioners were to "apportion the excess among the several subscribers, as they should judge discreet and proper." The bill charges a gross inequality in the apportionment among the subscribers, and that the distribution was principally confined to the commissioners themselves, their relations, and favourites.

The defendants, in their answers, deny all improper motives, in the execution of their trust, and aver that they made such an apportionment as they deemed discreet and proper, and best calculated to promote the interest of the village of *Catskill*, and of the community at large ; and that they believed there was a combination formed to suppress, or injure, the institution ; and that this was the governing motive for that extreme inequality in the distribution, which is not denied, but admitted. The question arises, whether the injunction, under these circumstances, ought to be continued to the final hearing of the cause. The next annual election of directors, under the charter, ought to take place on the last Tuesday of this month, and if that be not permitted, the institution will be dissolved. So far, at least, the injunction ought to be withdrawn ; and since all bad faith in the commissioners is denied, and their motives may have been not only

pure but commendable, it becomes a serious inquiry, whether the operation of the institution ought to be suspended during the further progress of this suit. The legislature must have considered the establishment of the bank in *Catskill* of public utility, or they would not have passed the law ; and so long as the operation of the bank is prohibited, so long that public utility is defeated.

The point raised, whether the exercise of the power of the commissioners, in making the apportionment, be subject to judicial correction, need not, necessarily, be decided upon the present motion. I have no doubt it may be controlled, if exercised in bad faith, and against conscience ; but whether a mere error in judgment ought to be reviewed, is a question deserving of much consideration.

Where a statute gives to commissioners a discretion, in a particular case, and for a special purpose, I doubt, exceedingly, whether a mistake of judgment, in that case, can be corrected. The supreme court seemed to think it could not, in the case of *Lawton v. The Commissioners of Highways*, (2 *Caines' Rep.* 182.) In the case of a special power granted to an individual by a will, to be exercised according to discretion, the court of chancery has repeatedly refused to interfere, and to judge of the motive, where there was great inequality in the distribution of property under the trust. (*Cevil v. Rich*, 1 Ch. Cas. 309. *Maddison v. Andrew*, 1 Ves. 58.) This is a stronger case than that of a private trust, created by the act of the party, or of a public trust, created for general purposes, and the courts would certainly interfere, in this case, with much greater reserve and caution. Here, the legislature selected the trustees, by name, for a special purpose, and for no other, and confided to them to act, in the given case, as they should judge *discreet and proper* ; and after the act was performed, they were to become *functi officio*.

These words, "as they should judge discreet and proper," gave an undefined discretion, and would be utterly

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1814. senseless, upon the construction that the apportionment was intended to be, to each subscriber, in a *ratio* to the amount of his subscription. That would have been a plain mathematical rule, without the exercise of any discretion ; and if that had been the meaning of the law, it would, undoubtedly, have said so. The word *apportion* must mean, here, to assign to each subscriber, ~~or~~ give him, such portion as the commissioners should deem meet.

Assuming, then, for the present, that the charge of corruption, or of a wanton and unworthy exercise of discretion, is repelled by the answer, I am of opinion that the injunction ought to be dissolved:

Motion granted.

May 13th.

In the matter of SOUTHWICK, a lunatic.

This court does not, ordinarily, and of course, interfere to compel the payment of solicitors' fees.

Where a commission of lunacy had been executed, and the lunatic, afterwards, discharged from it ; but, on the disease returning, a new committee was appointed, under a new commission, the court refused, on the petition of the solicitors who sued out and executed the first commission, to order the first committee to pay their costs ; there being no special reasons for the summary interference of the court.

DICKINSON and *MITCHELL*, solicitors, applied to the court, by petition, stating that they had procured a commission of lunacy to be sued out and executed in this case, and that *A. Staples* was appointed committee of the lunatic's estate, and that they had done other business for and in behalf of the said committee ; that the lunatic had since been discharged from the operation of the commission, but the

disease returning, a new committee, upon a new commission, had again been appointed ; and that *Staples* was about transferring his custody of the estate to the new committee, and had refused to pay their costs and expenses ; and they concluded with praying the aid of the court to compel payment.

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THE CHANCELLOR. The court does not, ordinarily, and of course, interfere to compel the payment of solicitors' fees. In certain cases such interference may be requisite, as where the committee becomes insolvent, and the costs would be lost unless made a charge upon the fund. Such was the case *ex parte Price*, (2 *Ves.* 407.) and in the case also of *Barnsley v. Powell*, (*Amb.* 102.,) the Chancellor declared, that the solicitor should stand in the place of the committee, so far as to enjoy the benefit of the committee's lien on the estate, as to the costs of a suit prosecuted for the lunatic. The solicitor has his remedy by suit, for fees, in this, as in other cases. If the committee was before the court, asking a settlement of his trust, and to be discharged from his responsibility, and from the bond which the court had taken, the court would, undoubtedly, require these costs and charges to be previously paid. Here are no special reasons assigned for this summary aid of the court, and the solicitor must be left to his ordinary remedy.

Motion denied.

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PERINE
v.
SWAINE.

May 16th.

PERINE against SWAINE and his wife, and DUNN.

If a *feme covert*, who is a defendant, puts in an *answer* separately from her husband, without leave, the court, on motion, will quash it.

THE answer of *Dorothy Swaine*, one of the defendants, was put in separately from her husband, and without leave.

Riggs, for the plaintiff, now moved to quash the answer, on the ground of irregularity. He cited *Bohm's Ch. Pr.* 116. 2 P. Wms. 371. *Wyatt's Pract. Reg.* 53. *Cooper's Eq. Pl.* 24.

Baldwin, contra, admitted the general rule, that a wife cannot answer alone, without leave; but he offered to procure the consent of the husband to the separate answer of the wife.

THE CHANCELLOR. The rule is well settled, that the wife cannot answer, separately, without leave or order of the court. The husband is her legal guardian and protector; and if there were reasons for her answering separately, they ought to have been made known to the court, that it might judge of their force. Here is no evidence of the previous consent of the husband to the answer, and the rule is well calculated to prevent the wife from being misled.

Motion granted.

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MATTER OF
NICOLL.*In the matter of WILLIAM NICOLL, an Infant.*

May 16th.

A guardian appointed by this court, during minority, continues until the infant arrives at 21, unless changed by order of the court, on good cause shown. An infant is not entitled, as of course, on arriving at the age of 14, to elect a new guardian.

IN 1799, *Selah Strong* and *Richard Udall*, were appointed, by this court, guardians of the person and estate of the infant during his minority. *Udall* was, some time since, discharged from his trust, to enable him to become a witness in certain suits in which the rights of the infant were concerned. In *October* last, the infant arrived at the age of 14 years.

Colden, in behalf of the infant, moved for the appointment of *Medad Rogers* and *Joshua Smith*, as his guardians, in the place of *Selah Strong*, on the ground that they were the choice of the infant, who, he contended, had a right to change his guardian, at his election, on arriving at the age of 14 years. And to show that the authority of a guardian in socage ceased, on the infant's arriving at the age of 14, when he might call his guardian to an account, and choose a new guardian, he cited *Bac. Ab. Guardian.* (E.) *Co. Litt.* 123. n. 67. *Vaugh.* 177.

Riggs, contra, relied on the authority of the opinion of *Dodderidge*, J., in *Palmer*, 22., that an infant cannot revoke or change a guardian appointed by chancery. Such a guardianship does not cease until the infant arrives at full age, unless another guardian is appointed by the court: and it was the same as to a guardian in socage, who continued until the age of 21. *Andrews' Rep.* 313. 5 *Johns. Rep.* 66, 67.

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Riggs, also, made a cross motion for an attachment against *Rogers and Smith*, for interfering with the ward, taking him from school, and exciting him against his lawful guardian, without just cause. He read the affidavit of *Strong*, and cited 2 P. Wms. 102. *Eyre v. Shaftesbury*, to show the power of the court in such cases.

THE CHANCELLOR. A guardian appointed by this court, during minority, continues until the infant arrives to the age of 21 years, unless removed by the court, on good cause shown. The infant is not entitled to come in, *as of course*, at the age of 14, and set aside the guardian at his pleasure. This court has the care and protection of infants during their minority ; and they have not, nor ought to have, any such power in regard to guardians appointed by this court. The motion to change the guardian must, therefore, be denied.

N. B. The cross motion for an attachment was withdrawn, on the suggestion that the parties charged with the contempt, acted under an impression that the infant had a right to elect a new guardian.



May 17th.

**TEMPERANCE GREEN AND OTHERS *against* JOSEPH
WINTER.**

Where G., being indebted to H., conveyed to W. certain bonds and mortgages, and part of the lands sold under the mortgages, and purchased in by W., *in trust*, to sell the same as H. might direct ; and "upon payment of such sums as might be justly due to W. in relation to the execution of his trust, or that he might advance or become liable for," to convey to H. the lands and proceeds thereof, and to assign over to H. the bonds and mortgages, taken by W., and which might remain in his hands, "after his said advances and responsibilities were secured and satisfied;" H. afterwards assigned over all his interest in the trust estate to his sister T., the wife of G., to her separ-

rate use, for life, with power to dispose of the same to, and among her children:

It was held, that payments made by the trustee to G., the husband of T., the *cestuy que trust*, were not chargeable on the trust fund; nor, if authorized by T., could the trustee be allowed the benefit of them, in his account, further than what was actually necessary for the support of herself and children; unless it appeared that the husband had applied the payments to the specific purposes of the trust.

A trustee cannot act for his own benefit in a contract on the subject of the trust.

So, a trustee, who purchases a mortgage or a judgment, which was a lien on the trust estate, at a discount, is not allowed to turn such purchase to his own advantage.

A trustee cannot demand a compensation for services, beyond what is founded on the positive agreement of the parties. And where a trustee, who was a counsellor at law, was to be allowed for "all his advances and responsibilities;" it was held, that though he was entitled to a liberal indemnity for his expenses and responsibilities incurred in the due and faithful execution of his trust, yet he was not entitled to a counsel fee, as a general retainer, nor for any thing more than what is understood, in the language of a court of equity, to be "just allowances."

A trustee is not entitled to commissions on sales of the trust property, or on moneys received and paid by him, or any compensation for his care and pains in executing the trust; but he is entitled to an allowance *per diem* for his time, and expenses of travel, &c.

Nor will a trustee be allowed for expenditures for improvements of the trust estate, though made *bona fide*, as in building houses and mills, clearing land, making roads, &c., such expenses not being within the purview of the trust, which was to sell land, to raise money, to pay off encumbrances, &c., and to restore the residue. He is entitled only to necessary expenditures, as for repairs, &c.

Nor will the purchase and sale of stock, hay, grain, and farming utensils, &c., be taken into the account of the trust estate.

Where a trustee, though called on for that purpose, refused to exhibit to referees appointed by the court, by consent of parties, an account of the rents and profits of certain parts of the trust estate, he was held chargeable with what, in the opinion of the referees, such parts of the estate would reasonably have produced.

Where a trustee agreed to purchase and pay for a farm, at the request and for the use of the *cestuy que trust*, out of the proceeds of the trust estate; and he purchased the farm, for which he gave his bond, secured by a mortgage on the premises; but when the bond became due, he refused to pay it, but procured a foreclosure and sale of the farm, by the mortgagee, at a loss of above 4,000 dollars, the trustee was held chargeable for this loss, and all the costs of the suits.

WILLIAM GREEN, one of the plaintiffs, and the husband of *Temperance Green*, in 1792, purchased certain lands

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in *Cosby's* manor, and in the patent of *Springfield*, under a contract of purchase, made in 1791, from the heirs of *John Morin Scott*; and, in 1794, he purchased three tracts of land in the *Oriskany* patent, of the trustees of Governor *Livingston*, deceased. A considerable part of the purchase money was paid by him; and, to secure the residue, he gave mortgages on the property. In 1796, and 1798, he sold the whole of the lands so purchased, to persons who gave their notes, and bonds and mortgages, for the purchase money; but they, afterwards, became insolvent, and *Green*, in consequence, became embarrassed, and was imprisoned for debt.

Patrick Heatley, of *London, Great Britain*, the brother of *Mrs. Green*, advanced, at different times, various sums of money for the support of herself and family; to secure which, as well as such further sums as he might afterwards advance, *William Green*, in *August*, 1803, conveyed to the defendant the bonds, notes, and mortgages, of the purchasers of the lands above mentioned; and the defendant executed a declaration of trust, that he held the same in trust, to collect and receive the proceeds, and to pay *Patrick Heatley* all moneys then due, or that might hereafter become due to him, from *William Green*, in any manner whatever; and the balance in trust for *Green*. *Heatley*, afterwards, advanced a sum to pay off the mortgage to the trustees of Governor *Livingston*.

Winter proceeded to foreclose the mortgages on the lands, which were sold, except two lots, by the master, under decrees for that purpose, subject to prior encumbrances, to the defendant, *Joseph Winter*, for 7,000 dollars, in trust for *Heatley*, to whom there were then due above 10,000 dollars.

On the 13th of *August*, 1805, the defendant executed a deed of trust, reciting, among other things, that *William Green* being indebted to *Patrick Heatley*, of *London*, had given him a lien on lands purchased of the executors of

Scott, and had assigned to the defendant, in trust, to secure *Heatley*, certain mortgages on land purchased by *Green* from the representatives of *Livingston*, &c., and part of which lands had been sold under those mortgages, and purchased by the defendant, for the benefit of *Heatley*; and the defendant, therefore, covenanted and agreed with *Heatley*, that he, and his heirs, would stand seized of those lands, *in trust*, to sell the same, in such small parcels, and for such prices, and on such terms of credit, as should be most beneficial to *Heatley*, or as he should in writing direct; provided, that it should be lawful for the defendant, with the approbation of *C. S.*, *N. P.*, and *R. M.*, or any two of them, or the survivors, if given in writing, to sell so much of the said lands as might be necessary "to reimburse himself of all such moneys as he might advance, pay, or expend, in execution of the trust;" or to discharge the notes, &c., which he might give to discharge the prior mortgages of *Green*: the defendant, also, further covenanted, that, "upon payment of such sums of money as might justly be due to him, in relation to the execution of his trust, or that he might advance or become liable for," he would, upon request of *Heatley*, &c., convey to *Heatley* the lands, or the proceeds thereof, after deducting as aforesaid; and that he would also assign to *Heatley* the bonds and securities taken by him, the defendant, and which might remain "after his said advances and responsibilities were secured and satisfied." The deed of trust further provided, in case any dissatisfaction should arise as to any matter or thing relating to the trust, the same should be submitted to the determination of *C. S.*, *N. P.*, and *R. M.*, whose decision, or that of any two of them, or of the survivor of them, should be conclusive; and that, in case the defendant should die, or becoming incapable of executing the trusts, the property should vest in *R. P.*, to the same uses, who should, out of the lands, or the proceeds thereof, pay to the defendant "all his real *bona fide* charges, advances, and responsibilities."

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*Heatley*, afterwards, on the 8th of *August*, 1806, assigned over all his interest in the trust, to his sister, *Mrs. Green*, for her life, and to her separate use, independent of her husband, and with power to dispose of the same among the children ; and from that time *Mrs. Green* has been the *cestuy que trust*.

It appeared, also, that the defendant executed another declaration of trust, stating that the purchase of lot No. 74, in *Cosby's Manor*, and the *Oriskany* farm, under a decree, was to be considered as made and held under the above trust.

In *June*, 1809, the plaintiffs filed their bill against the defendant, and supplemental and amended bills, in *October* and *December* following, stating, among many other things, the facts above mentioned, and charging the defendant with various breaches of trusts, &c. To these bills answers were put in by the defendant.

On the 8th of *June*, 1811, by consent of the parties, an order of *reference* was made in the cause, to *Morris S. Miller*, *Abraham Varick*, jun., and *Charles Broadhead*, or any two of them, to take an account of the receipts and payments, and responsibilities of the defendant, concerning the matters in issue, making him all just allowances ; and that, in taking such account, the referees were to proceed on the same principles and evidence as would be proper before a master ; and they were directed to state, specially, all matters of fact.

The referees met in *August*, *October*, and *December*, 1811, having adjourned twice, at the request of the defendant, to give him an opportunity to produce his accounts, vouchers, and evidence. Having completed their report, about the 1st of *March*, 1812, the referees caused a copy to be delivered to the counsel of each of the parties, and appointed a day for the parties to appear before them, to hear their report, and make their objections. At the day appointed, on the request of the defendant's counsel, the referees

adjourned to a further day, to give the defendant time to make his objections. At such further day, the counsel for the plaintiffs appeared, and stated various objections to the report; but no person appeared on the part of the defendant.

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The report of the referees was signed by them the 21st of April, 1812, and filed in court.

This report, with the documents accompanying it, was very voluminous. Such parts as are material to the understanding of the decision of the court, are as follows:

That on the 1st of January, 1811, the defendant had received on the trust estate, viz.

|                                     |             |
|-------------------------------------|-------------|
| On sales of land,                   | \$25,739 73 |
| On sales which failed,              | 460         |
| On bills of exchange,               | 3,277 60    |
| Of Christopher Roberts, and others, | 165 55      |
| On rents,                           | 2,311 56    |
| On stock, hay, and grain, &c.       | 1,789       |
|                                     | —————       |
|                                     | \$33,743 44 |
| Interest on the above sums,         | 10,239 55   |
|                                     | —————       |
|                                     | \$43,982 99 |

And that the defendant had entitled himself to the following credits, viz.

|                                    |             |
|------------------------------------|-------------|
| On the real estate,                | \$14,336 80 |
| Paid to Temperance Green, &c.      | 1,255 47    |
| For surveys,                       | 167 75      |
| For taxes,                         | 177 58      |
| For law charges,                   | 4,195 11    |
| Costs relative to the Gore,        | 170 11      |
| Costs in suits against Bennet, &c. | 520 14      |
| For commissions,                   | 3,516 37    |
| For time and expenses,             | 1,589 52    |
| For improvements,                  | 6,018 22    |
| For stock, hay, grain, &c.         | 2,885 50    |

|         |                             |             |
|---------|-----------------------------|-------------|
| 1814.   | On <i>Bayside Farm,</i>     | 1,699 88    |
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| WINTER. | Interest on the above sums, | \$36,532 67 |
|         |                             | 9,406 56    |
|         |                             | \$45,939 23 |

The referees rejected, from the account of the defendant, various sums for *commissions, brokerage, interest, compensations for time, travelling expenses, losses, postages, clerk hire, law charges,* which, with the interest thereon, amounted to about 19,000 dollars.

And they allowed him, under the head of *commissions, 10 per cent.* on sales of land ; *7 per cent.* on moneys received on contracts which failed ; and *2 1-2 per cent.* on the amount received on bills of exchange.

Among the *law charges* allowed by them, was 500 dollars, as a general retainer ; beside numerous particular fees, and bills of costs.

The charge allowed, for costs of suits against *Bennet* and others, were on judgments, as in case of nonsuit, for not bringing on the causes to trial, pursuant to notice, at the *Otsego* circuit, in *June, 1809* ; the defendant not having attended the circuit, the causes went off.

Both parties being dissatisfied with the report, exhibited and filed their exceptions in *August, 1812.*

The *exceptions*, on the part of the plaintiffs, were eight in number ; and in substance as follows :

1. That the general retainer of 500 dollars as counsel ; the costs in the suits against *Bennet* and others, and sundry bills of costs, fees, &c., amounting in the whole to 18,668 dollars and 5 cents, ought not to have been allowed.
2. That none of the charges for *commissions* ought to have been allowed, nor his time and travelling expenses, except for *actual disbursements and expenses.*
3. That no part of the sum allowed for improvements, building mills, houses, making roads, &c., ought to have been

allowed, except, perhaps, the costs of necessary repairs, amounting to about 700 dollars.

4. The allowance for stock, hay, grain, &c. ought not to have been made, as those charges could not concern the trust estate.

5. That the defendant having refused to exhibit, though required to do so, to the referees, an account of the rents, profits, and leases, he ought to have been charged with such rents and profits as they would have reasonably produced without neglect or wilful default, which would have been seven or eight hundred dollars ; and, also, that he ought to be charged with waste and destruction of wood and timber, to the amount of 1,000 dollars.

6. That as the defendant had caused the *Bayside Farm*, in *Queen's* county, which had been purchased for the residence of *Mrs. Green* and her family, out of the proceeds of the trust estate, and conveyed to *P. Heatley*, subject to a mortgage of the purchase money, to be sold under the mortgage, and thereby broke up the establishment of *Mrs. Green* and her family, which had occasioned a loss of more than 4,000 dollars ; and had purchased a judgment against *William Green*, on which he took out an execution, and caused it to be levied on the furniture and other personal property on the farm, and sold, and which he had before purchased as trustee for *Mrs. Green*, and been allowed for, he ought to have been charged with this *stock*, &c. and the *costs*, in addition to the *loss* produced by his causing the sale of the farm, &c.

7. and 8th exceptions not being particularly noticed in the opinion of the Chancellor, it is unnecessary to state them.

The defendant made *thirty-seven* exceptions to the report; but as most of them related to charges, resting wholly on matters of fact and evidence, it is necessary, here, to state only the two following :

1. Because the referees rejected about 19,000 dollars, including interest, from the sums charged in the defendant's

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account, and which were duly proved, and did not state the matters of fact specially relating thereto.

2. Because the referees have reported concerning a mortgage given by *William Green*, and his wife, to *Isaac Ogden* and *Philip I. Hoffman*, for securing two bonds; when, at the time of the reference, the defendant had no interest in them, and he so informed the referees, and he made no charge against the trust estate on account of the mortgage or bonds; but that if it was a proper subject for the referees to report on, they have not credited the amount paid for the mortgage, by about 350 dollars.

After a postponement of a hearing of the argument on the exceptions, on the petition of the defendant, they were again set down for argument in *January*, in 1813, when the defendant petitioned to have the report referred back to the same referees on the exceptions, and the petition was postponed for the next term. He then applied for a further postponement of the argument and decision on the petition and exceptions, which being denied, he declined arguing the exceptions; and on the 20th of *January*, 1813, the late Chancellor made a decretal order, overruling the defendant's exceptions, and allowing those of the plaintiffs, and confirming the report in other respects. On the 22d of *January*, an injunction was issued to restrain the appellant from meddling with the trust estates.

Pursuant to the decretal order of the 20th of *January*, 1813, an account was taken before a master, before whom the plaintiffs appeared, but the defendant neglected to attend; and the master, on the 8th of *February*, reported the sum of 20,510 dollars and 1 cent due to the plaintiffs.

In *April*, 1813, the defendant gave notice of a petition for a hearing on his exceptions, which had been overruled, and a rehearing on his petition for a re-reference of the report to the same referees. In *August*, 1813, the Chancellor ordered a hearing, in the nature of a rehearing of the exceptions and the petition, on payment of certain costs.

On application of the defendant, the hearing was put off; and in *April*, 1814, the cause came on to be heard before the present Chancellor, when the exceptions and petitions were all argued at the same time.

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*Pendleton*, for the plaintiffs.

*Harrison*, for the defendant.

**THE CHANCELLOR.** This case is brought to a hearing on exceptions, taken on each side, to the report of the referees. The defendant is charged as a trustee, and this trust appears in the declaration of trust, executed by the defendant on the 13th of *August*, 1805.

The objects of this trust are to be kept steadily in view in the examination of this case. The whole subject matter in controversy depends upon the construction of it, and the principles by which it is governed.

I shall first consider the principal exceptions taken on the part of the defendant.

[Most of the exceptions relating to charges depending altogether upon fact and evidence, it has been thought unnecessary to state the observations of his honour on those points.]

It is objected, that the defendant, having exhibited an account of payments to 19,000 dollars, the referees rejected about 17,000 dollars of the same. The question is not as to the fact of the payments, but whether they were made on account of the trust. I think they were properly rejected. They were payments to *W. Green*, and may be just, as against him. The trust was created for the benefit of *P. Heatley*, and was afterwards transferred to *Mrs. Green* and her children. Payments to *W. Green* were clearly *dehors* the trust, and not chargeable upon the trust fund. There is no sufficient evidence that *Mrs. Green* authorized

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these payments to her husband ; and having but a life estate herself, she could not have authorized them, to any extent, beyond the requisite support of herself and children. As far as the referees could determine them to have been advances on the trust account, they allowed them, to the amount of about 2,000 dollars. The court cannot allow any such misapplication of the trust fund, even to the husband of the *cestuy que trust*. (*Thayer v. Gould*, 1 *Atk.* 615. 2 *Atk.* 245.) If the husband had applied the payments to any specific trust purpose, the trustee might have been entitled to the benefit of such application ; but we have no evidence of any such appropriation.

The facts stated in the report are conclusive against the claim of the defendant, in respect to the mortgage given by *Green* and his wife to *Ogden & Hoffman*. It appears that this mortgage was executed in *July*, 1794, on part of the trust estate, to secure the payment of two bonds ; that the mortgage was not registered until after a conveyance to *Sands & Lothrop* ; that, after judgment was entered on the bonds, the defendant bought in the same, in *January*, 1810, at a discount, and issued execution against *Green*. The defendant refused to answer before the referees whether he had the mortgage as a lien on the trust estate.

This purchase ought, justly, and upon all sound principles of equitable policy, to enure to the benefit of the trust, and not to the benefit of the trustee. A trustee is not permitted to use the information he gains as trustee, by purchasing in for himself. It would be an extremely wrong thing, as the Lord Chancellor said, in *Norris v. Le Neve*, (3 *Atk.* 37.) The principle is the same as to buying in the trust estate, or buying securities upon it. A trustee cannot act for his own benefit, in a contract on the subject of the trust. (*Morrer v. Paske*, 2 *Atk.* 52. *Forbes v. Ross*, 2 *Bro.* 430.) The object of the rule is to keep trustees within the line of their duty. A court of equity watches the conduct of a trustee with jealousy ; and if he compounds debts or mort-

gages, or purchases them in at a discount, he shall not be suffered to turn the speculation to his own advantage. (3 P. Wms. 249. n. (a.) 1 Salk. 155.)

The objections taken on the part of the plaintiffs to the report, involve much more important considerations than those I have been examining; because they principally refer to the general rights and duties of a trustee.

1st. The plaintiffs object to the allowance of a number of charges, for costs, accrued to, or paid by the defendant in execution of the trust, amounting, in the whole, to 1,863 dollars and 5 cents. I think they may all be deemed just charges and allowances, except the first charge of 500 dollars, for "a counsel fee as a general retainer." This is clearly inadmissible. The trust was a voluntary undertaking for the benefit of *Heatley*, and voluntarily continued for the benefit of his sister and children. The trustee is entitled to a liberal indemnity for his expenses and responsibilities incurred in the due and faithful execution of the trust; but he cannot demand *compensation* beyond what may be founded on the positive agreement of the party. The declaration of trust contains no stipulation, or provision, for such compensation. It is cautiously worded throughout, and speaks only of allowances for all his "advances and responsibilities." The trustee cannot, therefore, charge anything more than what is understood, in the language of this court, by just allowances. I am obliged, therefore, not only to reject this general retainer, but, also, to admit the force of the

2d. Exception to the commissions of 10, and 7, and 2 1-2 per cent., allowed in the report. The 4 dollars a day, for his time and expenses, may be allowed on the ground of a fair indemnity; but I cannot go further, without shaking the best settled principles, in respect to the nature and character of the duties of a trustee. Nothing can be stronger, or more explicit, than the uniform language of the *English* court of chancery upon this point, or, if I were even free

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from the weight of authority, I should hesitate greatly before I undertook to question the policy or wisdom of the rule.

We find the principle advanced as early as the time of Lord Nottingham, in the case of *How v. Godfrey*, 30 Car. II., (*Rep. temp. Finch*, 361.,) in which the defendants, as guardians, "demanded 20*l.* for their care and pains in managing the trust." The Chancellor decreed, that they should have their costs and charges, and all just allowances, but not any thing for their care or pains. And in the next year, in the case of *Hethersell v. Hales*, (2 Ch. Rep. 83.,) we find the same distinguished Lord Chancellor making a liberal allowance to a trustee, under the head of "charges and expenses in managing the trust;" thereby not only settling the general rule, but, also, defining the limitations by which it was to be governed. The same doctrine has been continued through all the books, down to this day, whatever might be the nature of the trust, or the relative character of the trustee. (*Palmer v. Jones*, 1 Vern. 144. *Bonilhon v. Hockmore*, 1 Vern. 316. *Scattergood v. Harrison*, Moseley, 128. *Read v. Snell*, 2 Atk. 643. *Godfrey v. Watson*, 3 Atk. 517. *In the matter of Annesley, a lunatic*, Amb. 78.) In one of the latest cases, *Fearns v. Young*, (10 Ves. 184.,) Lord Eldon admits, that where a trustee has fairly expended money by reasonably taking opinions, and procuring directions necessary to the due execution of the trust, he was entitled to such charges, under the head of just allowances. In *Robinson v. Pett*, (3 P. Wms. 249.,) Lord Talbot declares the reasons of the rule refusing an allowance to a trustee for his care and trouble. viz. that, under that pretext, the trust estate might be loaded and rendered of little value; and, also, because of the great difficulty there might be in settling and adjusting the *quantum* of such allowance, as one man's time might be more valuable than that of another, and that the rule was no hardship upon the trustee, since the acceptance of the trust was of his own choice. In another

case, *Ayliffe v. Murray*, (2 *Atk.* 58.,) Lord Hardwicke observed, that chancery looked upon trusts as honorary, and a burden upon the honour and conscience of the trustee, and not undertaken upon mercenary motives, though a fair and open bargain with the *cestuy que trust*, for compensation, would be admissible.

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3. The same principle supports the exception to the allowance of 8,482 dollars 69 cents, including interest, for expenditures for improvements of the trust estate, as by building houses and mills, clearing land, making roads, &c. These expenses were not within the purview of the trust, which went only to authorize the defendant to sell the land, to raise money to pay off the encumbrances, and to restore the residue of the estate. The referees report that the improvements were made in good faith, but that, in general, they were of no real or substantial value to the trust property. These charges appear to be still more exceptionable than those under the head of compensation; and to tolerate such wide deviations from the nature and terms of the trust would be creating a most dangerous precedent. It would be placing trust property in the greatest jeopardy, and, perhaps, encumbering it with burthens too grievous to be borne. I cannot, therefore, admit of any allowances under this head, but such as may justly be considered as reasonable reparations or repairs, and these do not appear, from the report, to exceed much, if any, the sum of 700 dollars. Nor is this point left without a clear and explicit sanction in the decisions of the court of chancery. It is the established doctrine, that a trustee can only be allowed for necessary expenditures; (*Fountaine v. Pellet*, 1 *Ves. jun.* 337.;) and the *cestuy que trust* has always his option to take, or refuse, the benefit or loss of the unauthorized act of his trustee. (*Harrison v. Harrison*, 2 *Atk.* 120. 2 *Bro.* 656—8.) The case of *Bostock v. Blakeney*, (2 *Bro.* 653.,) is quite analogous to the present. That was a trust to purchase land, and the land was purchased, and money expended in repairs and im-

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provements ; and though the improvements were substantial and lasting, the Chancellor would not admit of such a misapplication of the funds of the trust. It must be, and always has been, the anxious wish of a court of chancery, to save a trustee from harm while acting in good faith ; but a misapplication of the trust property, by going out of the trust, can never be permitted to injure the *cestuy que trust*, without his assent. (2 P. Wms. 453. 3 Atk. 441.)

4. The next exception on the part of the plaintiffs, is equally well taken. The report states that the defendant paid, on account of the trust estate, for stock, hay, farming utensils, &c. to 3,729 dollars 37 cents, including interest, and that on the purchase and resale of stock for the farm, such as cattle, hogs, &c. he lost 1,300 dollars, and for which the report states the defendant was entitled to a credit. It appears further, that while the reference was pending, the defendant sold stock, farming utensils, &c. and refused to render an account, and that when examined before the referees, he said it was a question whether this agricultural stock was trust property, and that, if he was allowed the cost of it, he would credit the sales, and declined further to answer about the sales. The whole of this account, both debtor and creditor, ought to be struck out of the report, and not to be taken into the computation of the balance due. It was a business altogether out of the trust ; as much so as if the defendant had engaged in commercial or manufacturing business on the estate.

5. Another objection by the plaintiffs is, that the defendant ought to have been charged with such rents as the report states that the trust estate would reasonably have produced ; inasmuch as the defendant refused to exhibit to the referees, though repeatedly called on for the purpose, a statement of leases, or other contracts, for renting the farms belonging to the trust estate. This appears to me to be perfectly just, under the circumstances of this refusal, and the defendant ought to be charged with such reasonable

rents, from and after his assumption of the trust, in those cases in which the report states what would be a reasonable rent, and except in the special cases already mentioned.

6. The last objection relates to what is termed the *Bayside* farm, on *Long Island*. It appears that the defendant agreed to purchase this farm for Mrs. *Green*, and to pay for the same out of the proceeds of the trust estate; that he purchased it in *March, 1806*, and gave his bond and mortgage; that when the bonds fell due, the defendant refused to pay for the same, and caused the mortgage to be foreclosed, and also a suit in ejectment to be instituted, by means of which Mrs. *Green* was obliged to abandon the farm. The referees report, that the defendant had paid, on account of this farm, 6,751 dollars 44 cents, and had received, on the sale of it, 4,315 dollars 78 cents, and they charge the costs of the suits, and the loss on the sale of the farm, to the trust estate. The question is, on whom this heavy loss ought to fall; on the defendant, or on the *cestuy que trust*? Here was a trust voluntarily undertaken by the defendant, and he refused, eventually, to pay for the farm, according to his original undertaking, out of the trust estate, when he either had funds in hand to pay, or the means in his power to raise them. It appears to be an inequitable proceeding on the part of the defendant, and no just reason is given for the non-fulfilment of the trust. The farm had, in 1807, been conveyed to *Heatley*, subject to the mortgage. The conduct of the defendant, in suffering the farm to be taken for the debt, and in buying a judgment against *William Green*, and seizing, under it, the personal estate in possession of Mrs. *Green*, on that farm, (which facts are specially set forth in the report,) has strongly the appearance of a design to coerce the *cestuy que trust* to some undue accommodation. I am, accordingly, of opinion, that this exception ought to be allowed, so that the loss on the farm, and the costs of the suits, may not be chargeable to the trust estate.

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I have thus finished an examination of the numerous exceptions, taken on the one side and on the other, to the report of the referees, and if my conclusions may seem rigorous towards the defendant, it is because I found myself necessarily led to that result, by the facts in the case, and the known and settled principles of equity, in respect to the responsibility of a trustee. Those principles will appear all-important to the community when we consider the necessity of strict guards upon the powers of trustees, to whom are usually confided the interests of those who are incompetent to help themselves, and who are thrown, destitute and feeble, upon the protection of others. Individual hardship had better be endured in a particular case, by a strict adherence to rule, than to tolerate a relaxation, which might be productive of great public inconvenience.

I shall, therefore, direct the report of the referees to be referred to a master, to state an account upon the basis of that report, but subject to such variations and corrections as I have herein suggested.

The following order was thereupon entered :

" That the third exception of the defendant be allowed, so far only as respects the sum of three hundred dollars, therein stated by the defendant, and in the report, to have been paid by him to *James Battles*, to rescind a contract therein mentioned, for the purchase, by him, of certain lands from the defendant, as trustee for the plaintiffs, or some of them, whereby the lands became again vested in the said *Winter*, as trustee, in the same manner as other parts of the said trust estates, and that the said *Joseph Winter* be allowed the said sum of three hundred dollars, with interest thereon ; and that all the other exceptions of the defendant, to the report of the said referees, be overruled.

" And in relation to the exceptions taken by the plaintiffs to the report, it is further ordered, the first of the said exceptions be allowed, as far as respects the sum of

five hundred dollars, and the interest thereof, allowed in the report, to the trustee, as a retaining fee, which sum is not to be allowed to him on the account herein directed to be taken; and that the first exception, so far as it relates to all other costs and charges therein objected to, be disallowed; and that the costs and charges (except the said five hundred dollars, and interest) be allowed to the trustee, on taking the said amount; that all the other exceptions taken by the plaintiffs to the report be allowed, except as follows, viz.

" 1st. That in relation to the rents and profits chargeable against the defendant, as trustee of the estates mentioned in the report, he shall, for the rents of the *Oriskany* farm therein mentioned, for the years 1809, 1810, and 1811, be charged only with the sums stated in his accounts, filed with the said report, to have been received by him for those years; and that, in relation to the rents and profits of the same farm for other years, and of the remaining parts of the trust estates, the defendant shall account and be charged with what might reasonably have been obtained for the same, from the time he took charge of the said trust estates to the date of the report, which account is to be taken according to the facts therein stated, and interest allowed on them from the respective periods when the same would have been receivable, in the manner interest is calculated in the report on the debits and credits therein mentioned.

" 2dly. That the defendant shall be allowed the sum of one thousand seven hundred and seventy dollars, and interest stated in the report; to be allowed the said trustee for his time and expenses in and about the execution of the trust, and no more.

" And it is further ordered and decreed, that it be referred to Mr. *Hansen*, one of the masters of this court, to take and state an account of the amount due to the plaintiffs from the defendant, *Joseph Winter*; and that, in taking such account, the master proceed according to the report of the

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MULLETT.

referees, and the facts therein contained, subject to the variations and alterations herein directed, in relation to the exceptions and parts of exceptions herein before mentioned, as allowed or varied ; in relation to which, he is to be governed by the said exceptions, and the said alterations and variations thereof, as part of this order for taking the said account.

“ And it is further ordered, that the costs upon the said exceptions be allowed to the prevailing party, where they have been allowed, and to the opposite party, where they have been disallowed, to be taxed by the master ; and that the sum taxed in favour of the party having the smallest sum, be set off against the amount taxed in favour of the other party, and that the balance be paid.”



May 18th. MORRIS AND ANOTHER *against* MULLETT AND OTHERS.

It is too late, after two terms have intervened, and the decree is signed, to move for a retaxation of costs.

Pendleton, for the defendants, moved for a retaxation of the costs in this cause.

The notice for taxation was of the 17th of *August* last ; and was received on the morning of that day, too late to attend before the master. No application for retaxation was made at the subsequent terms, in *August* and *October* ; and the decree in the cause was made up, and signed in *October* last.

Riggs, contra.

Per Curiam. The application comes too late, and must be denied.

Motion denied.

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 TABLE
v.
TABLEE.

TABLE against TABLE AND OTHERS.

May 18th.

Where, on a bill of foreclosure, the widow of the mortgagor was made a party, and answered, and submitted to the decree of the court, she was held entitled to the use of one third of the surplus proceeds of the sale of the mortgaged premises, remaining in court, after satisfying the mortgage debt, as her equitable dower; and to her costs, to be paid out of the other two thirds. And the one third was ordered to be put out at interest, by the assistant register, for her benefit.

WILLIAM TABLE died in *July*, 1808, intestate, and indebted on a promissory note to the plaintiff; and *John Table*, his partner, died in 1810, intestate, and insolvent; and the firm of *John and William Table* was indebted to the plaintiff.

The widow of *William Table* took out letters of administration on his estate, and has fully administered the assets.

In 1806, *William Table*, and his wife, mortgaged his separate property to *Thomas Gardner*, for a debt, which mortgage has been foreclosed in this court; and the widow and heirs, who were made parties to the bill, appeared, answered, and submitted to the decree. The mortgaged premises were sold under the decree, and the debt paid; and the *costs* of the widow, in her answer to the bill of foreclosure, were paid out of surplus proceeds of the sale.

The plaintiff now applied to the court for payment of his debt out of the surplus moneys, after first satisfying the mortgage.

The widow claimed her dower in the surplus, but, after deducting her *third*, the remaining two thirds would not be sufficient to pay the plaintiff's demand, if the costs received by the widow were not charged upon her *third*.

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Riggs, for the plaintiff, contended, that the *costs* of the widow's answer ought to be charged on her *third* of the surplus proceeds of the sale.

Boyd, contra.

THE CHANCELLOR. The widow is entitled to the use of one third as the surplus moneys, after satisfying the mortgage debt, as her equitable dower; the same arising out of the real estate, in which she would have been entitled to her dower, at law, subject to the mortgage.

As she was necessarily made a party, and by her answer, submitted to the court, she was entitled to her costs out of the two thirds of the surplus moneys then in court, without prejudice to her claim of dower out of the gross amount of the surplus. The costs are not to be charged on her dower fund. The one third of the surplus must be put out at interest by the assistant register, and the interest paid to the widow.



May 18th. ELLISON, survivor, &c. against MOFFATT AND OTHERS,
representatives of MOFFAT.

A bill, filed in 1809, for an account as to transactions before and at the commencement of the *American* war, was dismissed on the ground of the stale-ness of the demand; 26 years having elapsed from the end of the war, before the bill was filed, and no cause shown for the delay; and especially, as against the representatives of the opposite party, who had no knowledge of the original transactions.

THE plaintiff filed a bill, in 1809, against the defendants, as the executors, heirs, and devisees of *Thomas Moffat*, deceased, for an account, stating an agreement, under seal, dated in *April*, 1769, between *John* and *William Ellison*

and the testator, by which they agreed to furnish the testator with a store of goods, which he was to sell on certain terms ; and the agreement was to continue for three years. In April, 1772, the agreement was renewed for six years, and it was unexpired when the American revolutionary war broke out, in 1775, and interrupted the business. The parties lived in the county of Orange. J. & W. Ellison took the goods remaining unsold, and the books. The object in taking the books was said to be, to prevent the debts being paid in continental money. They returned them to Moffat, at the end of the war, and after some of the debts had been collected by J. & W. Ellison. Moffat died in 1805, and in October, 1808, the books were redelivered to the plaintiffs, by the executors. By the books, it appeared that the testator had received debts as late as in the year 1791. The bill charged that the executors had offered to pay 2,500 dollars, which was refused.

The answer stated, that the executors were unable to state an account, having no books nor vouchers for that purpose ; that they were ready to deliver over the bonds, notes, &c., which were in their hands, when required ; that the executors did make such an offer of payment in satisfaction of the plaintiff's demand ; but that it was made under a belief that nothing was due, and with a view to purchase peace, and to avoid the expense of litigation with rich men, which the estate of the testator was unable to bear ; and they insisted on the staleness of the demand, and that it was barred by lapse of time.

Riggs, for the defendants, moved to dismiss the bill, on the ground of the staleness of the demand. He cited 2 Vesey, jun., 11. *Ray v. Bogart*, 2 Johns. Cas. 432.

S. Jones, jun., contra, cited *Hutton's Rep.* 109. 2 Vesey.
483.

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TRAVIS  
v.  
WATERS.

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**THE CHANCELLOR.** The parties lived in the same country, and, without accounting for the delay, the plaintiff suffered a period of 26 years to elapse, from the termination of the *American war*, to the time of filing his bill. The offer made by the executors being for peace, and without any recognition of the justness of the demand, and being rejected by the plaintiff, cannot affect the question.

It would not be sound discretion to overhale accounts, in favour of a party who has slept on his rights for such a length of time; especially, against the representatives of the other party, who have no knowledge of the original transactions. It is against the principles of public policy, to require an account, after the plaintiff has been guilty of so great *laches*.

The bill must be dismissed on the ground of the staleness of the demand; but without costs.

*May 18th.***TRAVIS AND OTHERS *against* WATERS.**

*A rehearing* rests in the *discretion* of the court, and is not granted on a decree for *costs* only, unless under special circumstances.

**RIGGS**, for the defendant, moved for a rehearing on a decree of last *October*, for *costs*, on the usual certificate of counsel, and on an affidavit stating the grounds of the alleged grievance and error; that costs of an action of ejectment, at law, had been allowed, though not asked for on the argument of the cause; and that costs which had accrued before the death of the testator, had also been allowed, though his personal representatives were not before the court in their representative character.

*Henry, contra, contended that a rehearing rested in the discretion of the court, and was not of course ; (3 P. Wms. 8. Amb. 91. 1 Har. Ch. Pr. 647—652. ;) and that it is not granted on a decree for costs merely. (Dickens' Rep. 594. 1 Bro. C. C. 141: n.)*

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 LANSING  
v.  
EDDY.

**THE CHANCELLOR.** The general rule is as stated by the counsel for the plaintiffs ; but a rehearing is usually granted, if there be colourable ground for the application. Even in cases of decrees for costs only, there are exceptions to the general rule ; and it is so admitted in one of the cases referred to. The facts alleged in the petition for a rehearing, in this case, are such as to render it proper and expedient that the case should be reconsidered.

Motion granted.

LANSING against J. AND T. EDDY.

June 2d.

An *injunction* will not be granted<sup>1</sup> to stay a sale under an execution, on the ground that the judgment has been fully paid and satisfied; for the party has a prompt and adequate remedy at law.

Nor will it be granted on the charge of usury, and the party seeks a *discovery* of the usury, and a return of the excess beyond the lawful interest ; for the usury would have been a good defence at law ; and no reason was given why the defendant did not seek the discovery while the suit at law was pending.

Chancery will not relieve against a judgment at law, unless the defendant was ignorant of the fact in question pending the suit, or it could not be received as a defence.

THE bill, which was for an *injunction*, stated, that the plaintiff, as security for *Jacob I. Vanderheyden*, and with him, gave a promissory note for 511 dollars and 70 cents, on the 14th of *March*, 1811, to *John Eddy*. That judgment

## CASES IN CHANCERY.

1814.

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LAWING
v.
EDDY.

was recovered on the note, in the supreme court, against both the makers, in October term, 1811, on which a *f. fa.* was issued immediately thereafter. *Vanderheyden* died insolvent, the 6th of April, 1813, and the property was advertised for sale, under the execution, on the 6th of June instant.

On the 21st of July, 1812, the plaintiff paid the sheriff, on the *f. fa.*, one hundred and fifty dollars, and on the 7th of March, 1814, he paid to *T. Eddy*, the assignee of the judgment, 74 dollars; on the 16th of March, 100 dollars; and on the 25th of March, 1814, 400 dollars, amounting to 724 dollars, on the judgment.

The bill further stated, that the above mentioned note was given to take up a former note, between the same parties, which former note was also given to take up another note; and that the original note was for a loan of money to *Vanderheyden*, on which *John Eddy* had exacted usurious interest. That before, or after the commencement of the suit in the supreme court, *John Eddy* assigned the note, or judgment, to his brother, *Tisdale Eddy*; and that, in the beginning of the year 1812, *T. Eddy* exacted, and received of the plaintiff, a note for fifty dollars, for forbearance and delay of execution, and which note he still holds.

The plaintiff prayed for a *discovery*, as to all the above charges, and for an *injunction* to stay the sale under the execution.

Foote, for the plaintiff.

THE CHANCELLOR. The injunction can only be granted upon one of these two grounds: 1. That the plaintiff has already fully paid and satisfied the execution; 2. That he seeks for a discovery of usury in the debt, and to obtain a return of the excess beyond the principal sum loaned, together with the lawful interest.

1. If the execution has been paid, the sale can be stopped

by a judge's order, and there is no need of the interference of this court. The remedy at law is prompt and adequate.

2. Nor does there appear sufficient cause for allowing the writ on the other ground. The first impression is, that the plaintiff comes too late even for the aid of this court. He was sued, at law, nearly three years ago, and it does not appear but that he was as well acquainted with the transaction then as he is now; and why was not the discovery sought for pending the suit at law? The usury would have been a good defence to the action. The general rule is, that this court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defence. If a party will suffer judgment to pass against him by neglect, he cannot have relief here for a matter which he might have availed himself of at law. (*Lee and Uxor v. Boles*, 2 Ch. Cas. 95. *Williams v. Lee*, 3 Atk. 223. *Scott v. Scott*, Mich. 1769., cited in 1 *Hall's Law Journal*, 305. *Le Guen v. Governeur and Kemble*, 1 Johns. Cas. 436.) Lord Hardwicke says, it must appear that the defendant was ignorant, at the time of the trial, of the fact which renders the verdict at law contrary to equity; and even then, chancery will not relieve where the defendant submits to try it at law first, when he might by a bill of discovery have come at the fact, by the plaintiff's answer, before trial at law.

There may be cases, perhaps, in which this general rule would be subject to some modification, but, generally, where a party has neglected his means of defence at law, equity will not interfere; and the present case has certainly so strong an appearance of neglect, that I do not feel warranted to allow the injunction.

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v.
Eddy.

Motion denied.

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BOGART
 v.
PERRY.

June 15th.

BOGART against PERRY AND OTHERS.

The 4th section of the statute of *Uses*, (sess. 10. ch. 37. 1 N. R. L. 72.,) rendering lands liable to execution against the *cestuy que use*, or *cestuy que trust*, applies only to those fraudulent and covenanted trusts, in which the *cestuy que use*, or *trust*, has the whole real beneficial interest in the land, and the trustee the mere naked and formal legal title.

A judgment, at law, is not a *lien* on a mere equitable interest in land; and the execution, under it, will not pass an interest which a court of law cannot protect and enforce.

A. being seized of land, agreed to sell and convey the same to B., for a certain sum, part of which was to be paid down, and the residue in three annual instalments; and A. was to execute a deed to B., on his paying the second instalment, and securing the residue by mortgage. B. paid the part down, and entered into possession, but neglected to pay the instalments; and more than two years after they had become due, and payable, B. assigned the contract to S., who took possession of the land, and made valuable improvements thereon; and S., without performing the contract with A., assigned it, and all his interest, to P., with knowledge, however, of a judgment existing against S., before such assignment. It was held, that the mere right, in equity, of S., as assignee of B., against A., on the contract for the sale of the land, was not the subject of *lien*, or judgment and execution.

JOHN ATKINSON, being seized in fee of lot No. 98, in *Junius*, on the 4th of *June*, 1804, by a written contract, agreed to sell to *Lewis Birdsall*, parts of the lot, or 296 acres, at 4 dollars per acre; 400 dollars of the purchase money to be paid down, and the residue in three annual payments; and a deed to be executed and delivered, on payment of the second instalment, with a mortgage for the residue of the purchase money. *Birdsall* paid down the 400 dollars, and, on the 20th of *September*, 1804, paid *Atkinson* the further sum of 172 dollars. *Birdsall* went into immediate possession of the land, under the contract; and, soon after contracted to sell 200 acres to *Asa Smith*, (one of the defendants,) who agreed to pay the balance due on the contract to *Atkinson*, and took possession of the land

so purchased, and erected a dwelling house thereon, and made large and valuable improvements. *Richard Harison* recovered a judgment against *Smith*, in the supreme court, for 450 dollars, of debt, which was docketed the 19th of *October*, 1808. In *April*, *May*, or *June*, 1809, *Smith* contracted to sell the 200 acres to *Perry*, for above 2,000 dollars, who agreed to pay off the balance due to *Atkinson*, and to pay the residue to *Smith*, when the judgment of *Harison*, and any other judgments binding the premises, were paid off; and gave his note payable accordingly.

The bill charged, that *Perry*, when he purchased of *Smith*, had full knowledge of *Harison's* judgment. Soon after this purchase, and before the 28th of *May*, 1809, *Birdsall* sold to *Perry* his contract with *Atkinson*, and *Perry* immediately surrendered it up to *Atkinson*, paid him 1,050 dollars, the balance due, and took a conveyance, in fee, from *Atkinson*, for the 296 acres; the legal title having remained in *Atkinson* until the time of this conveyance.

On the 25th of *October*, 1808, a *test. fi. fa.* was issued, on the judgment of *Harison*, against the property of *Smith*, by virtue of which, *Birdsall*, who was then sheriff of the county of *Seneca*, sold the 200 acres at public auction, to the plaintiff, *Bogart*, who was the highest bidder, and executed a deed to him, under the judgment and execution, dated *August* 1, 1809. On the 18th of *September*, 1809, the plaintiff tendered to *Perry* 1,063 dollars and 40 cents, in full of the money paid to *Atkinson*, and demanded a deed.

On the 9th of *May*, 1811, *Perry* sold to *John Van Tuyl*, (one of the defendants,) the whole 300 acres for 5,000 dollars, who paid down 1,000 dollars, the residue being payable in future instalments. The bill alleged, that *Van Tuyl* purchased with full knowledge of all the preceding facts. On the 26th of *July*, 1811, the plaintiff tendered to *Van Tuyl* 1,215 dollars, and demanded a deed for the 200 acres, which was refused.

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BOGART.

v.

PERRY.

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BEGART
v.
PERRY.

The bill was taken, *pro confesso*, against *Smith*.

Van Tuyl, in his answer, denied all knowledge of the facts charged in the plaintiff's bill.

Perry, in his answer, admitted most of the facts stated in the bill. He admitted that *Smith*, on or about the 1st of April, 1809, sold to him the 200 acres, &c. and that he agreed to pay the balance to *Atkinson*; that he paid 65 dollars down to *Smith*, and, afterwards, on the 24th of May, gave *Smith* his note, but he denied that it was intended to provide against *Harison*'s judgment. That soon after he purchased of *Smith*, he purchased the contract of *Birdsall*, and gave it up to *Atkinson*, though, when he purchased of *Smith* and *Birdsall*, the contract with *Atkinson* had become forfeited for non-payment. The contract was surrendered to *Atkinson*, the 28th of May, 1809, and in July following, he received a deed, and paid the balance due to *A.* He admitted the sale on *f. fa.* the 1st of August, 1809, to the plaintiff, for 30 dollars, and the tender made to him the 18th of September following; but he denied any knowledge of *Harison*'s judgment, until after he made his contract with *Smith*, and had entered into possession of the 200 acres, and had paid *Smith* 65 dollars.

Birdsall deposed, that in 1808 and 1809, he was sheriff of the county, and had frequent conversations, when sheriff, with *Perry*, respecting the *f. fa.*, in favour of *Harison*, against *Smith*. That such conversation was "a considerable time previous to the purchase, made by *Perry*, of the 200 acres of *Smith*, and that *Perry* often conversed with him, before the purchase, as to the propriety of making it."

Another witness stated, that he heard *Perry* say, in the early part of May, 1809, after he had taken possession of the land, that there were judgments against *Smith*, which he was afraid would give trouble. The note given by *Perry* to *Smith*, which was exhibited, dated the 24th of May, 1809, was for 885 dollars, to be paid "when all judgments

against said lot, No. 98, in *Junius*, are settled, respecting the said 200 acres," &c.

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v.
PERRY.

E. Williams, for the plaintiff.

Henry, contra.

THE CHANCELLOR. If a question of notice was material in this case, I should have no hesitation in deciding that *Perry*, when he took an assignment of *Smith's* interest, was chargeable, not only with constructive notice of *Harrison's* judgment, by means of the docket of the judgment, but with notice in fact. It does not appear to me, however, that *Perry* is to be affected by the notice, because *Smith* had no interest in the land on which the judgment could attach, or the execution operate. When *Perry* purchased, neither *Birdsall*, nor his assignee, had performed the contract with *Atkinson*. There had been not only a default in paying the instalments, but nearly two years had elapsed after the last instalment had been due; no reason appears in the case for this gross default; and if *Atkinson* had insisted on the failure, it is not certain that *Birdsall*, or his assignee, would have been entitled to a specific performance of the contract. But the mere right in equity, that *Smith*, as assignee of *Birdsall*, might have had against *Atkinson*, under the contract, was not the subject of the judgment and execution, as "real estate." No case has gone that length, and though an equity of redemption has been held liable to a sale on a *fi. fa.*, (*Watters v. Stewart*, 1 *Caines' Cases in Error*, 47.,) yet that was in a case in which the mortgagor was still in possession, and before any foreclosure of the mortgage, and on grounds peculiar to the case of a mortgage, in which the mortgagor is regarded, at law, as well as in equity, as the real owner of the land. It is on the same principle, that the interest of the mortgagee, before possession taken on foreclosure, is not subject to sale on execution. (*Jackson v. Willard*, 4 *Johns.*

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Rep. 41.) The provision in our statute of uses, (1 N. R. L. 74.,) rendering lands liable to execution against the *cestuy que trust*, has no application here; for that provision was taken from a branch of the English statute of frauds, and it relates only to those fraudulent and covenanted trusts, in which the *cestuy que use* has the whole real beneficial interest, and the trustee only the naked formal legal title. The statute, accordingly, provides, that, on such sales, the land shall be held and enjoyed, "freed and discharged of all encumbrances of the trustee;" which provision shows, that the statute cannot apply to this case. If the contract had been fulfilled, so as that *Smith* had been entitled to a deed, when the judgment was obtained, and the sale made to *Perry*, the statute might have applied, and there would have been reason and fitness in the application.

But, upon the facts in this case, I cannot perceive any interest in *Smith* which could be sold under the execution. *Perry* purchased only an equitable *chase in action*, and if, from the circumstance of part payment by *Birdsall*, and of *Smith's* possession and improvements, under the implied assent of *Atkinson*, a specific performance might have been enforced; yet above half of the purchase money was unpaid, and the equitable interest of *Smith*, in the land, at the time of the judgment, could not have exceeded the proportion between the amount of the original consideration, and the sum actually paid, which was less than half of the purchase money.

But judgments and executions at law were not intended by the statute to reach, nor have they been considered in practice as touching, such complicated and delicate interests. There is no more objection to this exemption than to that of *choses in action*, in general, and it is well known that they are not the subject of sale on execution. There must be either a realestate, or an interest known and recognised *at law*, or an equitable title within the purview of the provision in the statute of uses, to which I have alluded, or an execution at law will not reach it. A judgment at law is not a lien on a

mere equitable interest in land, and the execution under it will not pass an interest which a court of law cannot protect and enforce.

I am, accordingly, of opinion, that the plaintiff has not entitled himself to call the defendant, *Perry*, to account for the amount of his sale to *Van Tuyl*, and that the bill ought to be dismissed with costs.

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VERPLANK
V.
CAINES.

Bill dismissed.



VERPLANK AND OTHERS against CAINES AND HIS WIFE. June 15th

A demurrer to a bill in equity must be founded on some dry point of law, which goes to the absolute denial of the relief sought.

If the demurrer is bad in part, it is bad *in toto*.

The appointing a receiver rests in the sound discretion of the court; and forms no ground for a demurrer to a bill praying for the appointment.

THE bill stated, that *Gulian Verplank* was seized, at the time of his death, of real estate in the counties of *Delaware*, *Sullivan*, and *Dutchess*; that, on the 16th of *October*, 1792, *V.* made a will, devising all his real and personal estate to his wife, (now the wife of *Caines*,) for life, and after her death, to such of his children as should be then living; and appointed his wife executrix, and *John Johnston*, and *Francis Upton*, executors of his will, with power to them, or any two of them, to sell any part of the said real estate which they might think proper. The testator died in *November*, 1799, leaving his children, the plaintiffs, his heirs and devisees, in remainder, of his real and personal estate. In pursuance of the power in the will, *John Johnston*, one of the executors, and the executrix, sold parts of the real estate, and took bonds and mortgages for the security of the purchase money.

In *May*, 1802, the executrix intermarried with the defendant, *Caines*; and, in consequence of which, some of the

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bonds and mortgages came into his possession, or under his control ; and he had received some of the principal moneys due thereon, for which he had refused to give any account to the plaintiffs.

The bill prayed for a discovery of the payments made by the purchasers, the amount of them, and when made, distinguishing what had been received for interest, and what for principal ; and that all the said bonds and mortgages might be assigned to *John Johnston*, with power to receive the moneys, and to pay the interest thereon, annually, to the defendants, during the life of the wife, or that some other fit person be appointed receiver of the moneys, &c.

The defendants demurred to so much of the bill as sought a discovery of the sums received by the defendants for interest, and to that part which prayed for the appointment of a receiver, &c.

Pendleton, for the plaintiffs. (2 *Atk.* 387. 389. 3 *Ves.* jun. 253.)

Caines, contra. (9 *Johns. Rep.* 611. *Mitford's Pl.* 102. 136. *Cooper's Eq. Pl.* 166. 2 *Ves.* 247.)

THE CHANCELLOR. The defendants are not bound to account for, or, perhaps, to disclose the amount of interest which has been received by them, as the plaintiffs have no right to the same. The interest belongs exclusively to the defendants, under the will of the former husband of *Cornelia Caines*, and is a substitute for the rents and profits of the lands sold. But the defendants admit, in their answer, that they have received part of the principal due on the sales of the real estate of the testator, and for this they are accountable ; and it may form ground for the interference of the court in appointing a receiver. The exercise of this power must depend upon sound discretion, and in a case in which it must appear fit and reasonable, that some indifferent

person, under approved security, should receive and distribute the issues and profits, for the greater safety of all the parties concerned. Such a question is not ripe for decision until the hearing, and it cannot be the ground of a demurrer, at least, upon the facts charged in this bill. A demurrer, as Lord *Loughborough* observed, in the case of *Brooke v. Hewitt*, (3 *Ves. jun.* 253,) must be founded upon some certain and absolute proposition, destructive to the relief sought for. It must be founded upon some dry point of law, and not on circumstances in which a minute variation may incline the court either to grant, or modify, or refuse, the application. The demurrer is, as to this object, clearly bad ; and the rule seems to be settled, that a demurrer is not like a plea, which can be allowed in part : it cannot be separated ; and if bad in part, it is void *in toto*. (*Earl of Suffolk v. Green*, 1 *Atk.* 449. *Huggins v. York Buildings*, 2 *Atk.* 44. *Dormer v. Fortesque*, 2 *Atk.* 282. *Baker v. Pritchard*, 2 *Atk.* 389. *Baker v. Mellish*, 11 *Ves. jun.* 70.) Lord *Eldon* says, that where a demurrer is to be overruled for generality, it depends upon the leave of the court, whether the defendant shall put in another demurrer more limited ; or, perhaps, the defendant, during the pendency of the argument, may apply for leave to amend, when the demurrer applies to part of the bill only. Under these explanations, he admits and enforces the general rule.

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VERPLANT
v.
CAIRES.

Demurrer overruled.

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GREEN

v.

WINTER.

June 20th.

GREEN AND OTHERS against WINTER.

Where a *trustee* was restrained, by injunction, from interfering with the trust estate, and a *receiver* appointed by the court, and it became necessary to bring suits at law, to recover the possession of lands, and collect moneys belonging to the trust estate ; the court, on application of the *cestuy que trust*, ordered the *receiver* to bring the suits in the name of the *trustee*, on giving security to indemnify the *trustee*, on account of such suits; and that the *receiver* should hold the possession of the lands recovered, and moneys received by him, subject to the further order of the court.

THE *petition*, in this case, stated, that the defendant, in 1809, contracted to sell to *Jacob Multer* 50 acres in lot No. 45, in *Cosby's* manor, (held by defendant in trust for plaintiffs, see S. C., *ante*, p. 26—44,) for 750 dollars, with interest, payable in seven annual instalments, the whole of which, with the interest, except for one year, remained unpaid ; that *G. W. Murray* was appointed, by this court, a *receiver* of all moneys due to the trust estate, in trust for the plaintiffs. *Multer* was wholly unable to perform his contract, and had assigned it to one *Finstor*, who was able, but refused to pay : that an injunction was issued, in *January*, 1813, prohibiting the defendant from interfering with the trust estate, or receiving any moneys thereon, of which personal notice was given to *Finstor*, and public notice thereof given in the *Utica Gazette* ; that there is no way of enforcing the payment of the money due on the contract, but by an action of ejectment ; that the declaration of trust, executed by the defendant, provided, that if he should become incapable of executing the trust, the same should be vested in *Richard Platt* or his assigns ; that the defendant is now confined on execution, and *Platt* has assigned over the trust to *George W. Murray* ; that many parts of the trust estate are in possession of mere occupants, and adverse

claimants ; and some of the tenants of the defendant hold over.

The plaintiffs prayed that *Murray* might be authorized to commence actions of ejectment on the title of the defendant, as trustee, to recover the trust estate, in the cases mentioned, and to recover the lot sold to *Multer*, unless he, or those claiming under him, should, within a limited time, pay the amount due on the contract, and give a mortgage for the residue ; and that, on such payment, *Murray* should be authorized to give a deed.

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GREEN
v.
WINSOR.

Pendleton, for the plaintiffs.

Harrison and *Baldwin*, contra.

THE CHANCELLOR. Some person ought to be authorized to act in this case, for the security and benefit of the trust. The defendant cannot act ; for if the trust has not passed into the hands of *Murray*, yet the injunction restrains the defendant from acting ; and the special order of the court seems requisite, to authorize *Murray*, in the character of receiver, to institute actions of ejectment. (3 Bro. C. C. 88. 1 *Vesey*, jun. 164.)

No injury can arise to the defendant in granting the application, since *Murray* will be required to give security to indemnify the defendant, on account of any suit which he may institute in his name ; for that is the course in such cases ; (2 *Aik.* 213. ;) and he will have the possession of the lands to be recovered, as well as the moneys he may receive, in the case of *Multer*, subject to the further order of the court. On these terms, the motion is granted.

Motion granted.

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 STERRY
 v.
 ARDEN.
June 20th.

**ROBERT STERRY AND LOUISA ANN, HIS WIFE, against
ARDEN AND OTHERS.**

**ELIZA B. SERVANT, survivor, &c. against ARDEN AND
OTHERS.**

In two causes against the same defendant, depending on the same facts, the plaintiffs were respectively witnesses for each other; and after publication had passed, and the causes had been set down for a hearing, the defendant filed *cross bills* for discovery, on the ground that the witnesses had not fully and satisfactorily answered one of the cross interrogatories. A motion made to put off the hearing of the causes, until answers were put in to the *cross bills*, was refused, it being too late for such an application, and the answers not appearing to be evasive.

It seems that a cross bill must be filed before publication is passed in the first cause.

BILLS were filed for an account of rents and profits, &c. of two lots of land, conveyed by *James Arden*, the defendant, to *De Witt Clinton* and others, *in trust*, for the plaintiffs, *Louisa Ann*, and *Eliza*, who are the daughters of the defendant, *Arden*, by deeds delivered to them, the 25th of December, 1805, and, afterwards, in 1807, re-delivered by them to their father, and in 1809, deposited, by him, with *Clinton*. *Louisa Ann* married with the plaintiff, *Sterry*, in December, 1809. The defendant, *Arden*, then sold the lot to *Philip Verplank*.

Rules for publication were passed in the cause, about the 1st of May last; and the cause was set down for hearing, on due notice, at the last May term, and continued over to this day.

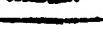
Cross bills were filed by the defendant, *Arden*, on the 9th of June instant, stating the circumstances under which the deeds in controversy were made and delivered; and that the plaintiff, *Louisa Ann*, and her sister *Eliza*, who was a plaintiff in another bill, in this court, on a similar deed, were

witnesses for each other; and that the plaintiff, *Louisa Ann*, had evaded the question put to her on the first cross interrogatory, and had not given a satisfactory answer to the same; and, in order to obtain a fuller discovery on that point, the cross bill was filed.

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STEARY

v.

ARMSTRONG

The first cross interrogatory was: "Have you ever heard the defendant, in the presence of the plaintiff, about the time of signing the deed, or at any other time, and when, declare that the property was intended for the use of the plaintiff, after the death of the defendant, and not before; and that he was to take the rents and profits during his life, or words in substance thereto; and that, in case she married without his consent, the deed was to be void?"

Harrison and *Emmett*, for the defendants, now moved to postpone the hearing of the causes, until answers were put in to the cross bills. They cited *Cooper's Equ. Pl.* 85.

Riggs and *Griffin*, contra. They cited *Wyatt's Pr. Reg.* 60. 86.

THE CHANCELLOR. This is an application to the discretion of the court, like the application to put off a trial at law; and if I could perceive any thing like evasion in the deposition alluded to, I should feel strongly inclined to grant the motion; and, especially, considering that the plaintiffs, in the two suits, are witnesses for each other, and have similar interests, depending upon the same point, in litigation. But I do not discover any just ground for the charge of intentional evasion, in the answer to the first cross interrogatory. The interrogatory was quite general, and not pointed to any particular conversation or declaration of the defendant, as to the limitation of the deed. The answer of one of the plaintiffs, *Eliza B. Servant*, states a conversation and declarations of the defendant, on the matter in question, and the time when, and declares, THAT was all she remembered rela-

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~~~~~  
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v.  
ADDEE.

*tive to the matters inquired of in that interrogatory, and that further thereto she could not depose.* The other plaintiff, *Louisa Ann Sterry*, states, that the first time she ever had any idea that the conveyance of the property, in the intention of her father, was accompanied with any condition, or restriction, was in January, 1809, on the delivery of the deed to Mr. Clinton; and she details what declarations of the defendant were then made; and adds, that *further to that interrogatory she could not depose.*

The omission to add a more particular and pointed negative of any further knowledge on the subject, so as to meet the very words of the question, was probably the act of the examiner, since the 29th rule of the court, as published in June, 1809, directs the examiner, after taking the deposition to what the witness can depose, to add one general clause, indicating that to the remainder of the interrogatory the witness cannot depose.

If the answers to the interrogatory have not the appearance of evasion, it is not a sufficient cause for granting the motion, that the answers are not quite satisfactory, and that a more direct and particular denial of any recollection or knowledge of other and further declarations of the party, might be desirable. The party should have been more vigilant in seeking relief, and not have waited several weeks after publication, and after the causes have been set down for hearing. It is believed that there is no instance in which, after so late a period of a cause, it has been permitted to be suspended by a cross bill. It is said to be an invariable rule, that a cross bill must be brought before publication is passed in the first cause. The defendant might have sought a discovery from the plaintiffs, by a cross bill, in the commencement of the suits; but he elected to examine them as witnesses in their respective suits, as against each other, and he was probably correct in supposing that what they deposed, as witnesses, might be adduced as testimony against them in their own causes. But after a party has examined a witness, in

the regular course, there must be something special to justify a re-examination of that witness ; and though the danger to be apprehended from such a practice may not apply here, yet it would be unreasonable to grant this double examination, in this case, without some very strong grounds ; for it necessarily leads to much delay and expense, and would be inconvenient as a precedent.

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**Motion, in each case, denied.**



*The Trustees of the METHODIST EPISCOPAL CHURCH, in June 25th.  
New-York, and the Children of T. Brown, against  
JOHN D. JAQUES AND OTHERS.*

If a defendant submits to answer a bill of discovery, &c. he must answer fully, except in certain cases, as where the discovery may tend to criminate him, or where he is a purchaser for a valuable consideration.

If the defendant rests himself on a fact, as an objection to a further discovery, it ought to be such a fact as, if true, would, at once, be a clear, decided, and inevitable bar to the plaintiff's demand.

A defendant is bound, in his answer, to admit, or deny, all the facts stated in the bill, with all their material circumstances, without any special interrogatories in the bill for that purpose.

The general interrogatory, or requisition, in the bill : " that the defendant may full answer make, to all and singular the premises, fully and particularly, as though the same were repeated, and he specially interrogated, paragraph by paragraph, with sums, dates, and all attending circumstances and incidental transactions," is sufficient to entitle the plaintiff to a full disclosure of the whole subject matter of the bill, equally as if he had specially interrogated the defendant to every fact stated in the bill.

Where a woman, before her marriage, executed a deed, to which her intended husband was a party, by which she conveyed all her estate, real and personal, to C., in trust, to her use, until her marriage, and then to such persons and uses as she, with the consent of her intended husband, should appoint by deed, or by her last will, without his consent, and the wife retained the deed during life, and executed a deed to her husband's brother, and, also, made a will, disposing of her estate, &c. it seems, that this deed,

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Jaques.

though it might not be legally valid, on account of some technical objection to its due delivery, would be good evidence of the agreement, and binding on the husband.

The costs on exceptions, like costs in all other cases in chancery, are subject to the discretion of the court. But the general rule is, that if the defendant submits to the exception, the plaintiff has his costs; and if they be referred to a master, the plaintiff shall have costs on the exceptions allowed, and the defendant his costs on the exceptions disallowed, and the balance struck is to be paid.

THE bill stated, among other things, that *Mary Jaques*, deceased, late the wife of *J. D. Jaques*, defendant, was, while the widow of *William Alexander*, her former husband, seized of real and personal estate to the amount of 50,000 dollars, derived, principally, from the will of her former husband; that before her marriage with the defendant, and in contemplation thereof, an indenture was entered into between her and the defendant, and *Henry Cruger*, on the 25th of September, 1805, by which she conveyed all her estate, real and personal, to *Cruger*, in trust, for her use, until her marriage with the defendant, *Jaques*, and then to such persons and uses, as she, with the consent of the defendant, should appoint, by deed, or by her will, without his consent; and if no such uses should be declared, then to *Cruger*, during her life, in trust; that she should receive the rents, profits, &c. and to lease the lands, &c. and not to be subject to the debts or control of her husband; that she and the defendant married, and she, afterwards, died; that, during the marriage, the defendant acquired the confidence of his wife, and assumed considerable agency in managing her estate, both real and personal, collecting debts and rents, loaning moneys on bonds and securities, &c. And he appropriated moneys belonging to her, and took securities in his own name, &c.; and invested moneys in real estate, and took the titles in his own name. That she held a bond and mortgage of *Christian Heyl*, for 8,000 dollars; that the mortgaged premises were sold, under the mortgage, and purchased by the defendant, and a title taken in his own

name, and the money due on the mortgage allowed to him in payment : and he claimed a right to the premises, which he had improved with other moneys of his wife. That among the notes and securities, taken by him to his own use, was a note of *Thomas Duggin*, for 500 dollars, and a note of *J. Holden*, for 500 dollars, &c.

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That, a short time before her death, Mrs. *Jaques*, in part execution of the power, on the 12th of September, 1812, conveyed, with the consent of her husband, certain real estate to his brother, *Robert Jaques*, in trust, to sell the same after her death, to give one third of the proceeds to the *Methodist Episcopal Church*, of New-York, (plaintiffs,) one third to the children of *Thomas Brown*, and the other third to her husband.

On the 21st of September, 1812, Mrs. *Jaques* made her will, and gave legacies to the children of *Thomas Brown*, and others ; and of the residue of her personal estate, she gave one third to the said church, one third to the children of *Brown*, and one third to her husband ; and made a similar disposition of her real estate. Her husband, *J. D. Jaques*, was one of the executors, and his two co-executors are plaintiffs. All the executors proved the will. All the specific legacies were paid. The personal estate of which Mrs. *Jaques* died possessed, was alleged to consist of moneys, and securities for moneys, outstanding debts, horses, carriages, and slaves. The defendant, her husband, resided in the house where the testatrix died, and became possessed of her papers, securities, money, &c. and refused to exhibit the same to his co-executors, so as to enable them to take an inventory ; setting up a claim of 12,000 dollars against the estate, for maintaining her, her horses, &c. ; on which account, the co-executors, plaintiffs, allege, they have not been able to make an inventory, &c. They specifically charge, that certain large outstanding debts and securities, due to the testatrix, were in the possession of the defendant, of which he would give no account ; and that he now lives on the estate and income of his late wife ; and

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1814. has fraudulently collected debts due to her, &c. And that  
 ~~~~~ Robert Jaques will not give any account of the real estate  
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"To the end that the defendants may full answer make,
 to all and singular the premises, fully and particularly, as
 though the same were repeated, and they specially interro-
 gated, paragraph by paragraph, with sums, dates, and all at-
 tending circumstances, and incidental transactions ; and that
 the defendant, J. D. Jaques, may exhibit the residuary per-
 sonal estate, in his possession, power, or knowledge, and ac-
 count for what he has received during, or since the cover-
 ture, and specify what real estate she has purchased," &c.
 &c. ; the plaintiffs prayed, &c. ; and that a *receiver* be ap-
 pointed, &c.

To the bill, the substance of which is above stated, the
 defendants put in their joint and several *answer*, to which
 fourteen *exceptions* were taken by the plaintiffs. The fol-
 lowing are those parts of the answer which were particularly
 excepted to, as being imperfect and insufficient, and as not
 containing that full, precise, and particular disclosure, which
 it was the object of the bill to obtain, viz.

1. The defendants admitted, that *Mary Jaques*, before,
 and at the time of her intermarriage with *John D. Jaques*,
 was seised and possessed of certain real estates, which they
 particularize ; and they, also, admitted, that the said *Mary*
Jaques, before, and at the time of her said intermarriage,
 was, also, possessed of, or well entitled to, some personal es-
 tate, consisting of slaves, household furniture, horses, car-
 riages, moneys, securities for moneys, and choses in action,
 but that they did not know, or believe, that the said person-
 al estate was of a large amount or value, or that the whole
 of the real and personal estate was of the value of 50,000
 dollars, and upwards, though they admit it was of considera-
 ble value.

2. *John D. Jaques* admitted, that he did, during his co-
 habitation with the said *Mary*, but at her request, and with her

entire approbation, assume and exercise a considerable agency in the management of her money transactions, and other property and effects, real and personal, and, particularly, in collecting rents and outstanding debts due to the said *Mary*, and in receiving the interest and principal of the debts due to her, and loaning out the money of the said *Mary*, but not on bonds and mortgages ; that he did not recollect, or believe, that any part of the said business was done by him in the name of the said *Mary* ; that he kept, and furnished to her, some accounts and memorandums of the said transactions, and occasionally gave her explanations of them, as far as the same were required, or deemed necessary, by her.

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3. The defendant also admitted, that the said *Mary* held a bond from one *Christian Heyl*, of the city of *New-York*, bearing date the first day of *July*, 1803, conditioned to pay 3,430 dollars, with a mortgage to secure the same, on three lots and houses, in the city of *New-York*, two in *Warren-street*, and one in *Murray-street*. That the interest of the said *Christian Heyl*, in the lot in *Murray-street*, consisted in a claim of a right to an unexpired lease on the said lot, under some agreement with an assignee of the said lease ; and that he also claimed a leasehold interest in one of the lots in *Warren-street*, and the fee simple in the other lot, subject, however, to certain prior encumbrances, made by *Heyl*, upon the lot in *Warren-street*, claimed in fee-simple.

4. That the said *Mary* held another bond of *Heyl*, dated on or about the 1st of *July*, 1806, conditioned to pay 2,772 dollars and 75 cents, upon which bond a judgment had been entered. That before any proceedings against *Heyl*, the said prior encumbrances had been duly assigned to the defendant, *John D. Jaques* ; and they admitted that the mortgaged premises were sold under the said mortgages, and that the leasehold interest of *Heyl* in the lot in *Warren-street*, was purchased by *William Wimerding*, and all the interest of *Heyl* in the other two

1814. lots, was purchased by *John D. Jaques*, and a title taken in his name, and the mortgaged money was allowed in payment of the premises so purchased ; but that the same was done with the knowledge and approbation of the said *Mary*.

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5. That *John D. Jaques* claims an absolute right to the house and lot in *Warren-street*, so purchased by him ; that he received the title therefor, took possession, and still holds the possession, claiming title thereto, in exclusion of the plaintiffs, or any of them ; and he denied that he had, with money belonging to the said *Mary*, or which was secured to her separate use, and which had come into his hands, built upon, or improved the said mortgaged premises so purchased by him, or rendered the same thereby of considerable value.

6. That after the expiration of the lease of the lot in *Murray-street*, or about that time, *John D. Jaques* received a new lease from the lessors in the first lease ; and had, for a fair and valuable consideration, *bona fide* assigned the said lease to *Robert Jaques*, one of the defendants ; and that he has no interest whatever in the said leasehold property, nor has he improved the same, or built on the same, with his own money, or the money of any other person.

7. The defendants further admitted, that the said *Mary*, at the time of her marriage with *John D. Jaques*, (if the instrument of the 25th of September, 1805, was legally executed, and is a valid instrument,) was possessed of, and entitled to, in her own right, divers securities for money, given by persons who were debtors to her at the time of the said marriage ; and before her decease, he obtained from different persons divers other securities for money which belonged to the said *Mary*, and which she had lent to divers persons, &c. And *John D. Jaques* denied that he collected the money due on the said securities, and applied the same to his own use, as distinct from

that of the said *Mary*, or lent out the said money again, in his own name, as his own money, or negligently or improperly lost or wasted the same, or disposed of the same, in any manner, unknown to her, in her lifetime, or that he practised any fraud upon the said *Mary*, &c.

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8. 9. The defendants further admitted, that the said *Mary*, at the time of her marriage with *John D. Jaques*, or shortly afterwards, had, or was interested in, the notes of *Thomas Duggin*, *J. Holden*, *William W. Rodman*, Doctor *Romayne*, Doctor *Brues*, and a draft, or bill, of one *Hermann*, as stated in the bill of the plaintiffs; and that she had a note of *Cotterell & Martin*, for 1,000 dollars, but not of *Cohale & Mon*, as stated in the said bill; and that she had such claims as before mentioned, against *Christian Heyl*, the contents of which notes and securities had been received by *John D. Jaques*, and applied as above stated; and he denied that the said *Mary* had, to his knowledge or belief, any such bond and judgment against the said *Thomas Duggin*, as stated in the said bill; and that he knew of no securities for money acquired by the said *Mary*, during her said coverture, as stated in the said bill, except those above particularly mentioned or referred to.

10. The defendants further admitted, that *John D. Jaques*, and the said *Mary*, shortly before her death, made and executed to *Robert Jaques*, a certain indenture, described in the bill of the plaintiffs; to which instrument they referred for greater certainty; that they do not know whether the said *Mary* did, or did not, intend, by the said instrument, to execute the power supposed to be reserved to her by the instrument of the 25th of September, 1805, as alleged in the said bill, nor had they any particular reason to believe that she did intend to execute such power; that he, *John D. Jaques*, by a writing in the conveyance to *Robert Jaques*, intended to express his con-

1814. currence in, and consent to, the disposition thereby made  
~~~~~ of the real estate of the said *Mary*, without regard to  
~~METHODIST~~
~~EPIS.CHRCH~~ any power supposed to be reserved to her as aforesaid.

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11. The defendants denied that all the specific legacies and bequests, made in and by the last will and testament of the said *Mary*, have been paid, delivered, assigned or transferred to the said respective legatees, though the defendants did not know that there was any question remaining, in regard to the said legacies, or any of them.

12. The defendants admitted, that the residuary personal estate of the said *Mary* consisted, except so far as some part thereof which may have been changed since her death, of slaves, carriages, securities for money, and outstanding debts, due to her at the time of her decease, and are now due to her executors. That they do not know which of the said debts, if any, have been received by *John D. Jaques*, (one of the executors of the said will,) without the concurrence, and against the wishes and consent of the other two executors, *Paul Hicks* and *Thomas Brown*; but they cannot admit, if any of the said debts were received by the said *John D. Jaques*, without the concurrence or consent of *Hicks* and *Brown*, that they were therefore improperly received by him.

13. The defendants, *John D.* and *Robert Jaques*, admitted, that the said *Mary* had, prior to her decease, a note of *Richard* and *Isaac Jaques*, for about 1,800 dollars, which was settled prior to her death.

14. That the said *Mary* had, some time prior to her decease, a note of *Thomas Nugent*, for 250 dollars, or thereabouts, which had been delivered by her to some person to collect for her, and never was in the possession of *John D. Jaques*.

It is not thought necessary to state the other parts of the answer, not excepted to, nor to set forth, particularly, the exceptions taken.

The exceptions were referred to a master, who reported thereon, and exceptions were taken to his report, which were argued by *Baldwin*, for the defendants, and *Harrison* and *Riggs*, for the plaintiffs.

The counsel for the defendants cited *Mitford's Pl.* 43, 44. 11 *Vesey*, jun. 292, 293. 296. 302, 303. 373. 376. *Barton's Suit in Equity*, 37. n. *Cooper's Equ. Pl.* 315. 2 *Harrison's Ch. Pr.* 94.

The plaintiffs' counsel cited 8 *Vesey*, jun., 193. 11 *Vesey*, jun., 290—302. *Cooper's Equ. Pl.* 316, 317. 1 *Har. Ch. Pr.* 302. *Prec. in Ch.* 137. 5 *Term Rep.* 384, 385. 2 *P. Wms.* 243. *Bunb. Rep.* 127. *Mitford's Pl.* 44.

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THE CHANCELLOR. This is a bill for discovery and account, called for by the plaintiffs as legatees and devisees under the will of *Mary Jaques*, the former wife of one of the defendants. The case comes before the court on exceptions to the answer, as being, in many respects, imperfect, and not containing a full and explicit disclosure.

Assuming that the answer contains only a partial discovery, and not sufficient to furnish materials for an account, it is alleged, that it contains the allegation of a fact destroying the title to a discovery, at least, to the extent prayed for, and that, until the truth of the fact be ascertained, no further answer can be required. The allegation is, that the deed to *Henry Cruger*, of the 25th of September, 1805, was never duly delivered.

The modern cases upon this point are not uniform, nor consistent.

In *Cookson v. Ellison*, (2 Bro. 252.) Lord Chancellor *Thurlow* laid down the rule, that where a defendant had submitted to answer, he must answer fully, and cannot stop short with a general and partial disclosure; and he said he would not enter into the question whether a demurrer or plea would have been allowed. This rule was again recognised by him, in *Cartwright v. Hately*, and in *Shepherd v.*

1814. *Roberts*, (3 Bro. 238.,) though the latter case was a bill
METHODIST
EPIS. CHURCH for an account as partner, and the defendant, in his answer,
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JACQUES. denied the partnership ; but the Chancellor said he should have pleaded it.

But later cases have very much impaired the force of this general rule, that where a defendant submits to answer at all, he must answer fully.

In *Newman v. Godfrey*, (2 Bro. 332.,) Lord Kenyon, as Master of the Rolls, observed, that where a defendant, by his answer, had denied all interest, and reduced himself to the case of a mere witness, he was not bound to answer the further circumstances of the case ; and he said, explicitly, that the case of *Cookson v. Ellison* was wrong. Lord Loughborough, in *Jerrard v. Saunders*, (2 Ves. jun. 454.,) said the same thing, and he ruled, that if a defendant states, in his answer, a purchase for a valuable consideration, without notice, he is not bound to go on and answer as to all the circumstances of the case that are to blot and rip up his title. In the case of *Jacobs v. Goodman*, in the exchequer, (3 Bro. 488. n.,) Ch. B. Eyre held the answer to be sufficient, which denied a partnership, and set forth no account ; for, unless there was a partnership, the plaintiff was not entitled to an account ; but he admitted that there might be cases where the court would require an account, though the principal point in the bill was denied.

So stands the rule on authority ; for though the point was frequently agitated before Lord Eldon, in *Dolden v. Lord Huntingfield*, *Faulder v. Stuart*, and *Shaw v. Ching*, (11 Ves. 283. 296. 303.,) he expressed no opinion on the point, but seems studiously to have avoided it ; and I should infer from the argument in these later cases, and from the opinion expressed by Cooper, in his " *Treatise of Pleading*," that the rule, as laid down by Lord Thurlow, was still understood, by the profession, to be the *general* rule, subject, however, to exception in particular cases, such as that before Lord

Loughborough, of an innocent purchaser, and of that before Baron *Eyre*, of a denial of the copartnership.

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There is nothing, in the present case, that seems to furnish any peculiar objection, on the ground of hardship, or injury, to the disclosure called for. The general aspect of the whole transaction is directly otherwise; and even admitting the deed to *Cruger* might not be valid in law, on account of some technical objection to its due delivery, yet, as the defendant was a party to that deed, before the marriage, and it was intended to provide for that event, and was retained by the wife, during her life; and that she executed a deed to her husband's brother, and made her will, both of which were cases provided for by the deed, I think it may well be made a question, whether that deed is not, at least, good evidence of the agreement, in equity, and binding on the defendant. The case of *Connel v. Buckle*, (2 P. Wms. 242.) would seem to warrant such a conclusion. If the party will put himself upon a fact, as an objection to the call for further discovery, it ought at least, to be a fact which, if true, would at once be a clear, decided, and irresistible bar to the demand.

I do not consider this to be such a case, and this objection to the exceptions fails; but the benefit of every objection to the relief, sought on the ground of the non-delivery of the deed, is reserved to the defendant upon the hearing.

The mere objection to a further discovery is, that the bill contains no special interrogatories. The bill contains the general interrogatory, "that the defendants may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and they specially interrogated, paragraph by paragraph, with sums, dates, and all attending circumstances, and incidental transactions." The question, then, is, whether this be not sufficient to call for a full and frank disclosure of the whole subject matter of the bill; and I apprehend the rule on this subject to be, that it is sufficient to make this general requisition on the defendant, to answer the contents of the bill, and that the interrogating

1814. part of the bill, by a repetition of the several matters, is not necessary. The defendant is bound to deny or admit all the facts stated in the bill, with all their material circumstances, without special interrogatories for that purpose.
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(*Mitford*, 44. *Cooper's Pl.* 11, 12.) They are only useful to probe more effectually the conscience of the party, and to prevent evasion or omission as to circumstances which may be deemed important ; but it is no excuse for the defendant, in avoiding to answer fully to the subject-matter of the bill, that there were no special interrogatories applicable to the case. Plain sense, and a good conscience, will, without any difficulty, in most cases, teach a defendant how far it is requisite to answer to the contents of the bill, and to meet the *gravamen* alleged ; and it is certainly desirable to avoid, if possible, the expense, and the prolixity of repeating, in the same bill, every material fact. It is well understood, that if the defendant be specially interrogated, it can only be to the facts alleged and charged in the bill. The one cannot be more extensive than the other.

Having, then, cleared this case of the technical objections, which were raised to the call for a better answer, I come to the exceptions themselves, and, without going minutely into the consideration of the several exceptions, I think the answer essentially defective. The charges are not met particularly and precisely. The defendant speaks in a general and loose manner, and evidently does not give the best information in his power, nor such a full and particular discovery as the nature of the bill requires. The rule laid down in the books is, that the defendant must answer specifically to the specific charges in the bill, and give the best account he can, so as to enable the plaintiff, if he calls for an account, to possess materials to state an account. (8 *Ves.* 193.) What circumstances, connected with the facts charged, are material and proper to be disclosed, must depend upon the nature and reason of the case, and will, generally, be easily ascertained by the exercise of ordinary sense and discre-

tion. The detail of attending circumstances is not to be so minute as to become burdensome and oppressive, nor so general as to withhold any information, material and proper for the case. The good sense of the pleader, and the nature of the subject, must determine the extent and application of the rule.

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Under these impressions, I have compared the answer with the bill, and the exceptions with the answer, and in my judgment, they are all, except the 10th, well taken, and must be allowed. As to costs on exceptions, they are like costs in all other cases in this court, subject to its discretion, and may be given or withheld, according to the exigency of the case, or they may be left to abide the event of the suit. But the general rule is, that, if the defendant submits to the exceptions, the plaintiff has his costs, and if they be referred, the plaintiff shall have the costs of the exceptions allowed, and the defendant his costs of the exceptions disallowed, and the balance struck to be paid. (1 *Schoales & Lefroy*, 241. 2 *Atk.* 551.)

Exceptions allowed.

GREEN AND OTHERS *against* WINTER.

June 28th.

An *appeal*, in the first instance, stays all proceedings in this court, on the matter appealed from ; and if the defendant wishes to proceed, notwithstanding the appeal, he must apply to the Chancellor for leave ; and unless the court of errors be, at the time, actually in session, and have the cause before them, this court must exercise its discretion as to the propriety of allowing the respondent to proceed.

Where an account was ordered to be taken before a master, on the principles laid down in the decree, this court refused to allow the account to be taken, pending the appeal from that decree ; nor would it direct the appellant to deliver over deeds, &c. relative to his trust.

THE petition stated the previous proceedings in this cause from the filing of the bill to the decree, in *May* last ;

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(Vide S. C. *ante*, p. 26.;) that an *appeal* had been entered from this decretal order, which the master, before whom the account was ordered to be taken, considered as suspending the execution of that order; that the defendant was directed to pay the costs in the several cases mentioned, and on the dismissal of the appeal, heretofore entered by the defendant, the whole of which costs, amounting to 171 dollars and 75 cents, were unpaid, and the defendant committed for a contempt for the non-payment.

The petitioner prayed that the cause might proceed, notwithstanding the last appeal; and further, that the defendant might be directed to execute a conveyance of the trust estate, mentioned in the pleadings, to *George W. Murray*, the *receiver*; and that he also deliver and assign over all the papers and documents relative to the trust estate, particularly a bond and mortgage from *William Green* to the executors of *J. M. Scott*, and another to *John Jay*, and two bonds and a mortgage to *J. Ogden* and wife, and *P. L. Hoffman*, and, also, a note and mortgage pledged to *Ephraim Hart*.

Pendleton, for the plaintiffs, contended, that the defendant could not be heard, until he purged himself from the contempt by paying the costs. (9 *Ves.* jun. 173. 1 *Har. Pr.* 163.) The mere entry of an appeal was not, *ipso facto*, a stay of proceedings in this court. In *England*, it was settled, that an appeal to the house of lords did not, of course, stay proceedings in the court below. It was matter of discretion in the house of lords, whether the appeal should have that effect or not. (9 *Ves.* jun. 316. *Colles' P. C.* 1.) By the sixth rule of the *court for the correction of errors*, in cases not otherwise provided for, the practice, on *appeals*, is conformable to that of the house of lords in *England*. (1 *Johns. Cas.* 507, 508.)

From some orders of this court, no appeal lies. (9 *Johns. Rep.* 443. 1 *Atk.* 295.) The appellant ought himself to make a special application to the court for a stay of pro-

ceedings, otherwise, the defendant should be allowed to go on. As to *bills of review*, there is no stay of proceedings, unless the mischief would be irreparable, or the right would be extinguished at law. (*Mitford's Equ. Pl.* 80. *Cooper's Equ. Pl.* 90. *12 Mod.* 343.)

So, at law, on a writ of error being brought, in cases out of the statute, the supreme court has a discretion in deciding whether the writ of error be a *supersedeas*. (2 *Term Rep.* 79. 3 *Term Rep.* 78, 79.)

Harrison and *Baldwin*, contra, insisted, that the general rule was, that if a party applied for a *favour*, he must first purge the contempt, before he could obtain it. The authorities went no further. The defendant is not in that situation.

Besides, a default in paying costs is no bar to the parties being heard on a totally distinct question.

As to the effect of an appeal; the true rule is, that an appeal, *prima facie*, stays all proceedings; and the defendant, before the court of appeals is in session, must apply to the court below for leave, if he wishes to proceed in the case at large, or in some particular point. The court below must, in the first instance, exercise its judgment, when and how an appeal does stay its proceedings; and the court above, when the cause comes before them, will pronounce definitively on it. It is true, that an appeal only stays proceedings applicable to, and dependent on, the matter from which the appeal is made. If the decree should be reversed, in this case, the taking of an account, on the basis of that decree, would be useless, and, of course, be set aside.

The second part of the plaintiffs' motion affects the *lien* of the defendant, and is founded on the basis of the decree, and ought to abide the event of the appeal. The application is premature.

THE CHANCELLOR. This application brings up the question, how far an appeal to the court above suspends the proceedings in this court.

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The rule now, in *England*, is, that an appeal does not stay proceedings. Lord *Eldon* frequently declared the rule, and he said it had been adopted in the house of lords, that an appeal did not stay proceedings in chancery, unless by special order of the house. (*Warden, &c. of St. Paul's v. Morris*, 9 *Ves.* 316. *Gwynn v. Lethbridge*, 14 *Ves.* 585.) He said he considered himself as acting, in that case, under the authority of the house of lords, and that, if the rule was wrong, it was more fit for the house of lords to correct it, than that he should act against precedent.

How long this has been the established rule, in *England*, does not appear. In one of the late cases, the counsel (Mr. *Mansfield*) said, the received opinion was otherwise, until the case of *Thelluson v. Woodford*, in 1798; and we are led to infer, from the observation of Lord Chancellor *Apsley*, in *Pomfret v. Smith*, (*Wyatt's Pract. Reg.* 35, 36,) that the practice, on appeal to the house of lords, was, that the Chancellor's jurisdiction was suspended only as to the matter appealed from.

There are difficulties in the operation of any general rule, either way. To proceed, as of course, in the cause, pending an appeal, might lead to a great deal of useless labour and expense to the parties, and sometimes to irreparable mischief; and, on the other hand, to permit the proceedings to be stayed in every case, would, as Lord *Eldon* observed, render a chancery suit the greatest nuisance; for, according to that doctrine, if a petition to stay proceedings in a cause was refused, the party would have nothing to do but to appeal from that order, and thus carry his point. There must, of necessity, exist a power and a discretion in the Chancellor, as a like power exists in a court of law, (2 *Term*, 78..) to determine, in the first instance, upon the operation of the appeal; as, whether it be brought upon an order from which an appeal will lie, and upon what points, and to what extent, the appeal operates as a stay of proceedings. I believe the practice in this court has always been accord-

ing to the more ancient opinion in the *English* chancery, and the appeal has been considered as a stay of proceedings ; this appears, also, to have been the understanding of this court, as declared in the 35th, 36th, and 37th rules of June, 1806. The 36th rule explicitly declares, that an appeal shall prevent the issuing of process upon the decree.

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My conclusion is, that an appeal does, in the first instance, stay proceedings *on the point appealed from*, and that if the party wishes to proceed, notwithstanding the appeal, he must make application to the Chancellor for leave to proceed ; and, *unless the court of errors should, at the time, be actually in session, and in possession of the cause*, it must rest in the discretion of this court to determine whether the application ought to prevail. The difference, then, between the *English* practice and ours, is, that by the former the plaintiff must apply for an order to stay the proceedings ; but, here, the defendant must apply for leave to proceed.

To come to the particular merits of this application ; the appeal is from the decretal order directing an account to be taken, and prescribing the rules and principles by which the master is to take it. This direction does, in fact, involve the merits of the controversy between the trustee and his *cestui que trusts* ; and I have no doubt it was an order upon which an appeal might be brought. I see no sufficient reason why the master should proceed to take an account, pending the appeal ; because, it could only be taken upon the principles laid down by the court ; and if those principles are not correct, the whole proceeding before the master would fall to the ground. I do not perceive any necessity, in this case, for taking such a step, *de bene esse*. The same observation will apply to the other branch of the application, which was for a rule on the defendant to execute a conveyance of the trust estate, and to deliver all the attending documents, to the receiver. Until the claims of the defendant are adjusted, he ought not to be

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compelled to part with his means of indemnity, and with the *lien* which the law has given him. There is no urgent necessity for this, since the defendant is disabled from meddling with the estate, and a receiver is appointed and authorized to collect the rents and moneys as they arise or become due. It is advisable to let the object of this application rest, and abide the event of the appeal.

The applications for leave to proceed, and for an order on the trustee to convey, are, consequently, denied, with costs.

June 2d.

GRAY against THOMPSON.

Where an assignee of property, in *trust*, for the benefit of the creditors of the assignor, having received the proceeds of the property in 1801, neglected, for many years, to distribute the fund among the creditors, pursuant to his trust, he was decreed to pay the amount, with *interest*, from the time he received the money, and all the *costs* of the suit brought by the creditors.

THE bill, in this cause, which was filed in 1803, stated, that *Edward Creighton* and *James Plaine*, partners in trade, were indebted, in 1798, and afterwards, to the plaintiff, in the sum of 213 dollars. *Plaine* died in 1798, and *Creighton*, the surviving partner, being desirous to pay the debt due to the plaintiff, and other debts, put into the hands of the defendant a bill of exchange, and goods, wares, and merchandises, to pay certain creditors of *Creighton* and *Plaine*, and among them the plaintiff. *Creighton*, afterwards, went to *New-Orleans*, where he died. The bill charged, that the defendant had received the money on the bill of exchange, and the proceeds of the goods so placed in his hands, but refused to account for the same. The plaintiff prayed a discovery of the amount in the hands of the defendant, and that he should account therefor, or for so much as

was sufficient to pay the principal and interest due to the plaintiff.

The bill was filed, as well in behalf of the plaintiff, as such other of the creditors of *Creighton* and *Plaine* as should come in and contribute to the expense of the suit. *Thompson*, in his answer, admitted, that he received of *Creighton* an assignment of the proceeds of certain goods, shipped by *Creighton* and *Plaine* to *Savannah*; and that, after much difficulty, he received the proceeds, and also a bill for 100 pounds sterling; that, at the time he received the assignment, he gave a receipt to *Creighton*, promising to distribute the fund between the other creditors of *Creighton* and *Plaine*, named in the receipt, and himself, but that he had no recollection or knowledge of the names of the said creditors, nor of the amount of their several debts, not having retained a copy of the receipt, nor supposing that *Creighton* was about to leave the city of *New-York*, where all the parties resided; that, in fact, *Creighton* soon after went to *New-Orleans*, where he had since resided, and the defendant had written to him several times, requesting of him a copy of the receipt, or directions how to distribute the fund, but had never heard from him; and the defendant professed a readiness to distribute the fund, whenever he was informed of the names of the creditors, and of the amount of their respective debts.

The assignment of the goods to the defendant, by *Creighton*, was proved by a witness who was a clerk to the defendant at the time, and who entered the goods in the books of the defendant, to the credit of the estate of *Creighton* and *Plaine*: and there being a deficiency of about 400 dollars, of the full amount due to their creditors, *Creighton* drew a bill of exchange on *Edinburgh*, in favour of the defendant, for 100 pounds sterling, dated the 10th of July, 1799, at sixty days sight, which had been duly honoured and paid, and was passed, also, in the books of the defendant, to the credit of the same fund; that in December, 1801,

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after the witness had left the service of the defendant, he was requested, by him, to assist in making out a distribution of the fund among the creditors of *Creighton and Plaine*, as it was then ready to be distributed, but the witness, being then about to leave the city, did not attend to the defendant's request.

The master's report stated, that the amount of the trust property in the hands of the defendant, in *July, 1799*, was 1,632 dollars and 71 cents, and that the debt due from *Creighton and Plaine* to the plaintiff was, on the 11th *March, 1799*, 213 dollars and 84 cents.

*Boyd*, for the defendant, contended, that being an innocent trustee, the defendant was not chargeable with *interest* or *costs*, but merely for the amount of the plaintiff's debt. He cited 1 *Vern.* 110. 1 *Ves. jun.* 452. *Prec. in Chan.* 254.

*Harrison and Wilkins*, contra, insisted, that the defendant had been guilty of gross negligence; having received the property, in 1799, and had been in cash for the amount since 1801, without having made any distribution of the fund; and that he ought, therefore, to pay *interest* and costs. They cited 1 *Vern.* 196. 2 *Vern.* 548. 1 *Bro. Ch. Cas.* 362. 375. 384, 385. 10 *Mod.* 21.

**THE CHANCELLOR.** The defendant received the trust fund as early as *July, 1799*, and a list of the creditors, of whom the plaintiff was one, and he promised to distribute the fund among the creditors, according to a list of them, named in a receipt which he gave to *Creighton*. He has not done it, and the plaintiff filed his bill in *April, 1803*. The defendant renders no sufficient excuse for not distributing this fund. He appears to have been guilty of negligence, and he does not show what he did with the fund in the mean time. The presumption is, that he appropriated

it to his own use. He is justly chargeable with interest, on the fund, from the time it was converted into cash, and with the *costs* of suit. This is the rule of the court in the case of a negligent trustee, and the cases which were cited by the plaintiff's counsel, particularly the one of *Treves v. Townshend*, in 1 Bro. 384, 385., are to this point. Let the decree be so entered accordingly.

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JACOB TRAVIS AND OTHERS *against* WATERS.

July 6th.

A decree, on a bill for a specific performance, on the coming in of the master's report, as to the quantity of land to be conveyed and the payments made, directing the balance due to be paid, and the conveyance to be executed, is a *final* decree.

If a *final* decree is silent as to *costs*, they are lost, and cannot, afterwards, be ordered to be paid, unless, on a rehearing, the decree has been opened for that purpose.

If a party dies before costs are decreed, they are lost; the general rule being, that the costs die with the person: but if costs have been decreed, and the party dies before they are *laxed*, they may be recovered by his personal representatives, on a bill of revivor; but to obtain the *costs*, the executors, or personal representatives, must be before the court, expressly in their character as such; for if the bill of revivor states the plaintiff to be the *heirs* and devisees of the party deceased, though some of them, in fact, are executors, yet they can only be known in their former character, and not as executors.

THE original bill, in this cause, was filed, in 1802, in the name of *Ezekiel Travis*, for a specific performance of a contract for the sale of land, and for an account. It stated, among other things, that the plaintiff took possession under the agreement, and made several payments; and that the defendant had since commenced an action of ejectment, to recover possession of the premises, and had obtained a verdict at law. The cause was put at issue, and much contradictory testimony given, respecting the alleged payments, and

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a feigned issue was awarded to ascertain the fact of certain payments, and a verdict was thereupon found for the plaintiff. In *October*, 1808, this court decreed a conveyance of part of the premises, and directed a master to take an account of the quantity to be conveyed, and of the payments, and to ascertain the balance due, if any, to the defendant; that the same be paid, and that the conveyance thereupon be made; and the question of costs was reserved until the coming in of the master's report. From this decree there was an appeal to the court of errors, and the decree was affirmed.(a) The original plaintiff, afterwards, died, (13th of *August*, 1812,) and the suit was revived in favour of the present plaintiffs, who are the heirs and devisees of *Ezekiel Travis*; and two of them executors of his last will. By a decretal order of the 23d *January*, 1813, the suit was ordered to stand revived, and the master, as before, was directed to take an account, and the balance, if any, to be paid, and the conveyance to be executed; and that further directions be reserved until the coming in of the report.

The master made his report, in *May* following, which was confirmed; a small balance was reported to be due to the defendant, on the tender of which, with the interest, a conveyance was ordered, by a decree of the 31st of *May*, 1813. This decree being silent *as to costs*, an application was made, in *September*, for costs, and, on the 8th *October*, costs were decreed, by the late Chancellor, including, as well the costs of the original suit as of this suit, and of the ejectment suit, as well as of the feigned issues tried at law.

In *May* last, a rehearing was ordered upon the question of costs.

*Henry*, for the plaintiffs. 1. To show that costs follow the justice of the demand, in equity, as well as at law, he

(a) Vide 9 *Johns. Rep.* 450.

cited *Roberts v. Kniffer*, 2 *Aik.* 112. *Blackburn v. Gregson*, 1 *Bro. C. C.* 424, 425.

2. He contended, that the decree of the 18th of October, 1808, was a final decree, reserving only the question of costs.

3. He insisted that the rule that costs die with the person, if applicable to the plaintiff on a bill of revivor, is applicable only where there is a decree for *costs* alone; not where there is also a *duty* decreed to be performed. (2 *Ves.* 580. 3 *Aik.* 772.)

4. As to any objection that the *personal* representatives of *Ezekiel Travis* are not before the court, that is matter of form, and is a reason for letting the cause stand over, until they are technically made parties, as executors. But it is expressly alleged in the bill, that two of the plaintiffs are the executors of *Ezekiel Travis*, though it is not alleged that they proved the will.

*Riggs*, contra, contended; 1. That the decree of October, 1808, was interlocutory, and that of the 31st of May, 1813, the final decree, in the cause; and that being silent as to *costs*, they are gone. So, if *interest* is not reserved by the decree, the court cannot give it. (*Hale v. Greenbank, Dickens' Rep.* 370.)

2. As *Ezekiel Travis* died before any decree for *costs* was made in his favour, they are lost, as *costs* could not be decreed after his death. It is a general rule that, if *costs* are not taxed, they die with the party. (*Kemp v. Mackrell, 2 Ves.* 580. 3 *Ves. jun.* 195.)

3. But if the *costs* are recoverable, the parties entitled to those *costs*, which accrued during the lifetime of *Ezekiel Travis*, are not before the court. They are recoverable by the executors only, not by the heirs and devisees: and the plaintiffs are not before the court in the character of executors. (3 *Johns. Rep.* 543. 1 *Dickens' Rep.* 16. 2 *Dickens*, 768.)

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4. But if the executors were properly before the court, they could not recover the costs, for the reasons already alleged; so that there can be no reason for staying the proceedings until they should appear as executors.

5. On no principle whatever ought the costs of the ejectment to be recovered; as the defendant put the plaintiff to unnecessary costs, by defending the suit on the grounds which could not be supported.

**THE CHANCELLOR.** The first objection to the decree of the 8th of *October*, 1813, for costs, was, that the question of costs was not reserved in the decree of the 31st of *May* preceding, and that as the decree was silent as to costs, and was a final decree, they were gone or waived, and could not afterwards be awarded, unless on application for a rehearing, and for opening the decree, which was not attempted.

I have no doubt that the decree of *May*, 1813, is to be regarded as the *final* decree in the cause. It was made upon the coming in of the master's report, ascertaining the lands to be conveyed, and the balance to be previously paid. It was the final end and closing of the controversy, and was analogous to a final, as contradistinguished from an interlocutory, judgment at law. The decree of *October*, 1808, cannot be so regarded, for though the right to a specific performance was declared generally, yet the extent of that right, and the conditions upon which it was to depend, were not ascertained. The plain reason of the thing, the obvious meaning of the term, and the definitions in the books of practice, all concur to show that the decree of the 31st of *May*, 1813, and not the decree of the 27th of *October*, 1808, was the *final* decree in the cause. (*1 Har. Prac.* 622.)

Being a final decree, and being silent as to costs, they were undoubtedly lost; as much so as if they were omitted to be awarded, and incorporated in a final judgment at law. This is the settled rule; and Lord *Northington*, in the case of *Herle v. Greenbank*, (*1 Dickens*, 370.,) said, that even

interest is lost, unless it be reserved by the decree on hearing the cause on the coming in of the master's report.

2. But even if this technical objection did not exist, it is contended, that as *Ezekiel Travis* died as late as the 13th of August, 1812, but before any decree of costs was made, the right to costs became extinct by his death; and the rule, at law and equity is said to be the same in such cases, and that the costs die with the person. (*Lloyd v. Powis, Dickens*, 16. 2 Ves. 580. and 461. *White v. Hayward*. *Hall v. Smith*, 1 Bro. 438.)

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I have examined the books on this point, and have not met with a case allowing costs, under such circumstances, to the representatives of the party. The general rule is even more rigorous than this, for if the party die before costs be taxed, though they be decreed, they are gone. (2 Ves. 461.) Lord Hardwicke, in *Kemp v. Mackrell*, (2 Ves. 580. 3 Atk. 811. S. C.,) said, that this was a hard rule, as it turned on the distinction, whether the costs were taxed or not, and the right was as certain before taxation as after; and accordingly, in *Morgan v. Scudamore*, (3 Ves. jun. 195.,) the Chancellor established the rule, that where the plaintiff dies *after* a decree for costs, and before taxation, they may be recovered by his representatives, by a decree for revivor. The same principle had been admitted and acted upon by Lord Hardwicke, in *Blower v. Morreis*, (3 Atk. 772.) The only point, in all these cases, was, whether costs already decreed, but not taxed before the death of the party, were recoverable; but the question is not so much as agitated any where, whether there be any ground for a claim for costs if the party die before they have even been *decreed* or considered.

3. This objection, therefore, is decisive as to the costs that had accrued in the lifetime of *Ezekiel Travis*: But if this difficulty was not in the way, there would still be another and a third difficulty to be surmounted, and that is, that the personal representatives of *Ezekiel Travis*, who, if any, would have

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been the persons entitled to these costs, are not before the court. The bill of revivor is by the heirs and devisees, in the capacity of heirs and devisees; and although two out of the ten plaintiffs are stated in the bill of revivor to be executors of *Travis*, yet they are not alleged to have proved the will, or to have taken upon themselves the trust, nor have they revived the suit in that capacity; and we can only know them in the character in which they appear before the court. (*2 Dickens, 768. 3 Johns. Rep. 552.*)

For these reasons, and upon either of the grounds I have suggested, I am of opinion that the plaintiffs are not entitled to a decree for the costs that had accrued in the lifetime of *Ezekiel Travis*, and, for the reason first mentioned, they are not entitled to the costs that have accrued since. Upon a view of the whole merits of this controversy, I do not think there is any cause to regret the application and operation of the general rule. The parties to the original contract, and which was the source of all this long and expensive litigation, were both in default, in slumbering for many years over the non-execution of the contract, and not calling for its prompt performance, nor doing all that was incumbent on each party respectively to do, to entitle him to a fulfilment. The tendency of such delays, is always to obscure the truth and certainty of transactions, and to render the performance doubtful and difficult. It is consonant to the dictates of justice and good policy, that each party should be made to feel the inconvenience of such neglect, defaults, and delay, by being subjected to the payment of his own costs; and this has frequently been the course of the court in such cases. (*Radcliffe v. Warrington, 12 Ves. 335. Wynne v. Morgan, 7 Ves. 202.*)

Costs denied. (a.)

(a) Affirmed, on appeal, March 27th, 1815, vide 12 Johns. Rep. 500.

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SIMPSON

V.

HART.

July 15th.

## SIMPSON against J. HART.

Judgments, not only in the same court, but in different courts, may be *set off* against each other, at law; and the powers, of courts of law, in allowing such *set-off*, does not depend upon statute, but on the general jurisdiction of the court over its suitors.

Where a party applied, in the first instance, to a court of law, to allow the *set-off*, and that court, after a full consideration of all the circumstances of the case, refused to allow it, this court refused to sustain a bill filed for an injunction and a *set-off*.

A decision of a court of competent jurisdiction, being *res judicata*, is conclusive and binding on all other courts of concurrent jurisdiction.

THE bill stated, that the plaintiff recovered judgment in the mayor's court of the city of New-York, in December, 1813, against the defendant, and *E. Hart*, for 4,585 dollars and 43 cents, damages, for certain assaults and batteries; that, afterwards, in the same term, the defendant, *J. Hart*, recovered judgment against the plaintiff for 500 dollars damages for certain assaults and batteries; that on the 8th of January last, the plaintiff obtained an order to stay proceedings in the said causes, and applied, on due notice, to the mayor's court to have the damages in the last-mentioned cause deducted from the damages recovered in the first cause, on an affidavit, stating the existence of several unsatisfied judgments against the defendant, prior in date to the judgment obtained by the plaintiff against him and *E. Hart*, on one of which the execution was returned *nulla bona*; that the motion to the mayor's court, to allow the deduction by way of *set-off*, was denied; that several unsatisfied judgments, against *E. Hart*, now exist, prior in date to that of the plaintiff, and that the present defendant is now in prison on a *c. s. a.* The plaintiff prayed for an injunction, to stay proceedings in the cause of the defendant against him; (which was granted;) and that so much of his judgment might be *set off* against the defendant's judgment.

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The *answer* admitted the substance of the facts stated in the bill, and added, that the *recorder*, on the motion for a *set-off* in the mayor's court, with a full knowledge of all the facts that appeared in evidence on the trial, and after considering all the legal and equitable reasons arising out of the case, denied the motion. The defendant admitted the judgments against him, as alleged, and that he was in prison; and that judgments were existing, as alleged, against *E. Hart*, his father, but said that they had been entirely, or in great part, paid off; and that he did not believe that *E. Hart* was insolvent.

*Wilkins*, for the defendant, now moved to dissolve the injunction staying the defendant's execution at law. He cited *2 Black. Rep.* 869.

*T. A. Emmet, Colder, and Riker*, contra. They contended that the bill set out facts not before the court below, viz. the *insolvency* of the defendants; that the decision in the court below was not, therefore, in the legal and technical sense, *res judicata*. If the plaintiff had no remedy in this court, the decision of the court below would be conclusive, and without appeal. Now, it would be dangerous and oppressive to permit every county court to exercise *equitable powers*, in matters of *set-off*, without appeal. A summary decision on a motion, in this way, was not that *res judicata* which could be pleaded in bar. They cited *2 Wash. Rep.* 36. 255. 260. *Prec. in Ch.* 233. *Vent.* 351, 352. *1 Ves.* 323. 326. *13 Ves.* 180. *2 Vern.* 146, 147. *2 Esp. Rep.* 627. *3 Bl. Com.* 388. *1 Burr.* 394. *2 Atk.* 603. *Cooper's Eq. Pl.* 267. 269. *5 Ves.* 610. 614, 615, 616, 617. *2 Caines' Rep.* 40—51. 56. *7 Term Rep.* 455. *7 Ves.* 14, 15. 19. 21. *Finch's Rep.* 472. *Vaulx v. Sherry and others.*

*Harison*, in reply, contended, that courts of common law exercised the equitable power of setting off judgments, long

before the statutes, and before our revolution. It was a power inherent in the courts of law, from the reason and justice of the thing. The case of *Vaulx v. Sherry*, was anomalous, and the cases cited from *Virginia*, consider it as founded on a *refusal* of justice at law. There is no precedent for such a power in a court of chancery, as is now claimed. Anciently, it is true, there were instances of a court of chancery relieving against an oppressive verdict; but that practice ceased as soon as courts of law became more liberal in granting new trials. Courts of chancery now refuse to interfere, because the parties have complete remedy at law.

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If the plaintiff had applied to this court, in the first instance, his bill would have been sustained; but he elected a court of law, and having made his election, he must be bound by the judgment of that court. There is no new equity in this case. (1 *Johns. Cas.* 436.) In *Lechmere v. Hawkins*, (2 *Esp. Cas.* 627.) Lord Kenyon meant no more than that, if the party could not be relieved in a court of law, he might seek relief in a court of equity. So, in the present case, if the *recorder* had refused the application, as not within the jurisdiction of the mayor's court, the party might apply here.

**THE CHANCELLOR.** This is a motion to dissolve the injunction, and it necessarily involves the consideration of the main question arising upon the pleadings, viz. whether, after the decision in the mayor's court, disallowing the set-off, this court ought now to interfere, and direct the judgment obtained by the defendant to be deducted from the amount of the judgment obtained by the plaintiff against the defendant and his father, *Ephraim Hart*.

It is admitted that the question of the set-off was raised in the mayor's court, upon the motion of the plaintiff, and that, upon a consideration "of all the legal and equitable reasons" arising out of the case, the motion was denied.

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There are no additional facts stated in the bill, and confessed by the answer, which can materially affect the merits of the question. The prior judgments against *Ephraim Hart*, were not shown on the application in the mayor's court, though the party had it in his power to have done it; but the existence of these judgments, when shown, does not afford any new and *distinct* ground for equitable relief, since they only form an additional *item* of testimony, going to the same point with that before introduced, and which was the insecurity of the plaintiff's debt. We have then, here, the same question, resting on the same principles, as the one considered and decided in the mayor's court; and it is certain that the mayor's court had competent jurisdiction over it.

In *Barker v. Braham*, (2 Black. Rep. 869.,) decided some time before our revolution, the *English* court of C. B. permitted a judgment of the K. B. to set off against a judgment in the C. B., so as to narrow the execution to the balance. That case admitted and sanctioned the equitable and salutary jurisdiction of the courts of common law, in cases beyond the letter of the statutes of 2 & 8 G. II. Subsequent cases, in the *English* courts, have confirmed this doctrine, and carried it into effect. It has been observed, that the power of setting off judgments, not only of the same, but of different courts, did not depend upon the statutes of set-off, but upon the general jurisdiction of the court over its suitors, and that it was an equitable jurisdiction, and frequently exercised. (*Montagu on Set-offs*, 6. *Mitchill v. Oldfield*, 4 Term, 123. *Glaister v. Hewer*, 8 Term, 69.) The same principle has been often recognised, and acted upon, by the supreme court of this state. (3 *Caines*, 190. 1 *Johns. Rep.* 144. 3 *Johns. Rep.* 247.) It is very clear, then, from these authorities, that the mayor's court had a full, established, and rightful cognizance of the relief sought by the present bill; and it must have been exercised according to the impression which that court received of the justice and equity of the case.

The plaintiff elected to seek his relief in the mayor's court, upon the very point now raised by the bill. He had his choice, whether to apply to that court, or to this, in the first instance. That court had concurrent equitable cognizance of the question, and this court is now, in effect, called upon to review the case, when it has, confessedly, no such appellate jurisdiction. The general principle is, that the decision of a court of competent authority, or a *res judicata*, is binding and conclusive upon all other courts of concurrent power. It is a principle, which pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, and is founded in the soundest policy. (*Dig. 44. 2. & Voet. ibid. Kaims' Equity*, vol. 2. 367.) It springs from that *comity* which is due from one court of concurrent jurisdiction, in the given case, to another; and from the necessity of putting an end to litigations which have been once heard and decided, and of preserving mutual harmony, respect, and confidence between the several tribunals concerned in the same administration of justice. These considerations have struck my mind with great force, and I have been induced to examine the cases which have been supposed to intimate a different doctrine. In the long course of judicial decisions, cases will sometimes appear, which seem, at first sight, to contravene the best settled rules. This arises as often from imperfect and inaccurate reports of cases, as from any other cause. But, on this subject, I find no modern case, in which chancery has taken cognizance, on the same grounds, of the very point which another court, of competent authority in the case, has considered and decided. Whenever the bill has been sustained, it has always been upon some new matter of equity, not arising in the former case, or for some relief, to which the powers of the court of law were not fully and effectually adequate. Thus, in the *annuity* case, on which much stress was laid by the plaintiff's counsel, (*Bremley v. Holland*, 5 *Ves.* 610.,) it was urged, that the application at law, had been merely upon

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the manner upon which the consideration was paid, and had no reference to the new and clear objection then raised. It was further observed, that the summary application to a court of law, was given, by the statute, in specified cases only, and that it was not intended to shield the grantee from another application, on different grounds; in short, that the K. B. could not exercise the jurisdiction prayed for by the bill. The *Master of the Rolls* pursued in the same train of remark in giving his opinion, and observed, that the plaintiff was not to avail himself of any objection that was the ground of application to the K. B., and that the bill sought to set aside the annuity, not on the ground on which the K. B. was called on. It was, doubtless, for these reasons that the Lord Chancellor, when the case came, afterwards, before him, on appeal, (7 *Ves.* 3.,) said that he had laid out of the case the applications to the K. B.

As to the *dictum* of Lord *Keynon*, in *Lochmire v. Hawkins*, (2 *Esp. Rep.* 626.,) it may want some explanation, but, as it stands, it does not appear to touch the point before us. It does not apply to the case where a court of law, having equitable jurisdiction in the case, *had actually exercised it*, and the unsuccessful party had resorted to chancery for relief; but it was only applicable to a case in which a court of law would not, or could not, assume cognizance of the matter of defence. Nor do the *dicta* of Lord *Hardwicke* and Lord *Thurlow*, (1 *Ves.* 327. 7 *Ves.* 19.,) which were also cited upon the argument, amount to any thing more than the general remark, that the jurisdiction of courts of law, over the case of *proferts* of lost deeds, and of the consideration of a deed, and of accounts, does not destroy the ancient jurisdiction of chancery in matters of that kind. But *dicta* are never to be relied on when repugnant to established principles, and nothing would be more dangerous to the law, as a science, than to set up loose, extra-judicial sayings, as a just ground of decision. The case of *Hart v. Lovelace*, (6 *Term Rep.* 471.,) shows, in a more authentic shape, the real

opinion of Lord Kenyon, on the effect of the exercise of concurrent powers. That was also a case respecting a memorial under the annuity act, and it had been before the court of chancery. This induced Lord Kenyon to remark, that he had "some difficulty in his mind respecting the decree in chancery; that if the question had been brought before that court, and had received a judicial decision, he should have thought himself bound by it, as being the judgment of a court having competent jurisdiction over the subject matter. But the proceedings there were *diverso intuitu*; this suit had a different object in view, and the question before the K. B. did not arise in that court." The other judges expressed themselves to the same effect.

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Before courts of law were in the exercise of their present liberal jurisdiction over the subject of new trials, the parties were frequently forced into equity, to be relieved from oppressive verdicts. (3 *Black. Com.* 388. *Vaulx v. Shelleys, Rep. temp. Finch*, 472.) Since, however, that jurisdiction has been well established, and freely exercised, on equitable, as well as legal grounds, the party failing in his application at law for a new trial, will not be relieved in equity, at least, upon the same merits already discussed, and fully within the discretion of a court of law. Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than the courts of law, in a similar case, could re-examine a decree of the court of chancery. In the case of *Baleman v. Willoe*, (1 *Schoales & Lefroy*, 201.) we have the opinion and decision of so high and respectable an authority as Lord Redesdale, on the subject now under consideration. A verdict was obtained, at law, against the plaintiff, which he considered unjust, and having failed in his application for a new trial, on account of a defective notice of the motion, he sought relief in equity; but the bill was dismissed, and Lord Redesdale said, that he could not find any ground whatever for a court of equity to interfere, because

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a party had not brought evidence which was in his power at the trial, or because he had neglected to apply, in due time, for a new trial. "There are cases," he observed, "cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and, therefore, equity does sometimes interfere; so, where a verdict has been obtained by fraud, or where a party has possessed himself, improperly, of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using: but without circumstances of that kind, *I do not know,*" says Lord Redesdale, "*that equity ever does interfere, to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction.*" But, upon the principles of the present bill, application might be made to this court, in most cases, where a motion for a new trial had been denied in a court of law.

The settled doctrine of the *English chancery* is, not to relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it could not have been received as a defence; (*Williams v. Lee*, 3 Atk. 223.) this was also the doctrine of the court of errors, in the case of *Le Guen v. Gouverneur & Kemble*, (1 Johns. Cas. 436.)

This case is one of the strongest, against the interference of this court, that could well be presented, for the party is not seeking relief against any *laches*, or mistake, or fraud; but he is seeking for a review of his case, after failing in a voluntary application to the equitable powers of the mayor's court, on the very point now submitted, and after that application had been received, heard and denied. If this fresh attempt could be sustained, there would be no equality of right between the parties. The remedy would not be reciprocal, for if the set-off had been allowed in the mayor's

court, it will not be contended that the defendant could have been relieved here against it. The principle that a matter, once considered and decided by a competent power, shall not be reviewed by any other tribunal having concurrent power, except in the regular course of error or appeal, does not rest upon the mere technical form of the decision. That would be too narrow a ground; decisions in the case of new trials do not appear upon record, and they are also decisions resting in sound discretion. It is the unfitness, and vexation, and indecorum, of permitting a party to go on successively, by way of experiment, from one concurrent tribunal to another, and thus to introduce conflicting decisions, that prevents the second inquiry; and it ought to be observed, as an answer to much of what was said against the incompetency of the courts of common pleas over such questions, that if this mode of review was to prevail, it would apply as well to the case of an unsuccessful application to the supreme court, as to any of the courts below it.

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The motion to dissolve the injunction is, accordingly, granted.

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*In the matter of Ichabod Andrews, an Infant.*

July 26th.

A surrogate has power to appoint a *guardian*, but has no jurisdiction over him as a trustee.

Chancery has the same superintendance and control over guardians by *statute*, or *testamentary* guardians, as it has over guardians in *socage*.

THE petition of Sarah Gilbert stated, that she was mother of the infant, who was born in October, 1807, and that in December, 1808, Justus Gilbert, the second husband of the petitioner, was, by the surrogate of Cayuga county, appointed

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MATTER OF  
ANDREWS. That in January, 1812, *Justus Gilbert* absented himself from the petitioner in a secret manner, and enlisted in the army of the U. S. for five years. That he is now on the western frontier, and has converted to his own use the personal estate, and the rents and profits of the real estate, and has lately attempted to dispose of the real estate; and that he is in habits of extreme intemperance, &c.; and that the infant is a charge on the petitioner; who prayed for relief, &c.

The facts in the petition were sworn to.

**THE CHANCELLOR.** Though the guardian was, in this case, appointed by the surrogate, under the act of 1813, (*N. R. Laws*, vol. 1. 454.,) he is as much under the superintendance and control of this court, as if he had been appointed by it in the first instance. The power of the surrogate extends only to the *appointment* of the guardian; he has no general jurisdiction over him as trustee. That power remains unimpaired in this court, and every guardian, however appointed, is responsible here for his conduct, and may be removed for misbehaviour. It has repeatedly been declared, that a testamentary or statute guardian is as much under the superintendance of the court of chancery as the guardian in socage. (*Beaufort v. Berty*, 1 *P. Wms.* 704. *Eyre v. Countess of Shaftesbury*, 2 *P. Wms.* 107. *Rouch v. Garvar*, 1 *Ves.* 160.) I shall, therefore, direct a reference to a master, to ascertain the truth of the allegations contained in the petition, and to report thereon.

Rule accordingly.

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*July 26th.***HERRICK against BLAIR AND BLAIR.**

Arbitrators, after a witness had been sworn and examined, and they were left alone to deliberate on their award, called the witness again, and, without the knowledge or presence of the parties, examined him as "to matters material to the controversy, on which he had before given testimony, but about which the arbitrators differed as to what the witness did testify on the former hearing." An injunction to stay a suit at law, on the arbitration bond, for the non-performance of the award, was refused.

Awards cannot be impeached, or set aside, unless for corruption, partiality, or gross misbehaviour in the arbitrators, or for some palpable mistake of the law or the fact.

THE bill stated, that, on the 31st of *March* last, the parties to the bill submitted their matters in difference, relative to a lease of five acres of land, at *Greenbush*, from the plaintiff to the defendants, for five years, &c. to three arbitrators, and entered into arbitration bonds accordingly; that the arbitrators met, and heard the parties and their proofs; and after the arbitrators were left alone to deliberate, they called before them a witness who had been already sworn and examined; and, without the knowledge, or consent, or presence of the parties, examined the witness "to matters material to the controversy, of which he had given testimony before, and about which the arbitrators differed, as to what he testified on the former hearing." That the award was in favour of the defendants, and awarded the plaintiff to pay to them 100 dollars, which he had refused to do; and had been sued at law on the arbitration bond. The plaintiff prayed for an injunction to stay the suit at law, and for general relief.

*Champlin*, for the plaintiff, moved for the injunction, and cited 6 *Ves.* 70.

**THE CHANCELLOR.** There was nothing done, in this case, by the arbitrators, from which *misconduct* can be infer-

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red. They only called a witness before them, who had been already examined in the presence of the parties, to *explain* his testimony concerning which the arbitrators differed. It is not alleged, nor is it to be inferred, that the witness deposed differently, as to any fact, from what he meant to have testified, and to have been understood, on the first examination. The case does not come up to that of *Walker v. Frobisher*, (6 *Ves.* 70.,) for there the arbitrator, after he had told the parties that the hearing was closed, and had dismissed them, examined three more persons on the part of the defendant, and when no person was present on the part of the plaintiff. This was unfair, partial, and a gross misconduct, and contrary to all the principles of a just proceeding. There is no analogy between that case and this; and to interfere and set aside the award upon an irregularity, (even admitting it to be one,) so slight and immaterial as the one now set up, would be contrary to the general doctrine of the court in respect to awards. The uniform language of the cases is, that an award cannot be impeached but for corruption, partiality, or gross misbehaviour, in the arbitrators, or for some palpable mistake of the law or the fact. The arbitrators are judges of the parties' own choosing; their proceedings and award are treated with great liberality, and even a mistake upon a doubtful point, often will not open an award. These principles have been declared and asserted in a series of decisions, all going to the same point, and containing a weight of authority not to be resisted. (*Earle v. Stocker*, 2 *Vern.* 251. and *Pitt v. Dawkra*, cited, *ibid.* *Cornforth v. Geer*, 2 *Vern.* 705. *Ives v. Medcalf*, 1 *Atk.* 63. *Ridoul v. Pain*, 3 *Atk.* 486. *Tittenson v. Peal*, 3 *Atk.* 529. *Anon.* 3 *Atk.* 644. *Hawkins v. Colclough*, 1 *Burr.* 274. *Knox v. Symmonds*, 1 *Ves. jun.* 369. *Morgan v. Mather*, 2 *Ves. jun.* 22. *Chace v. Westmore*, 13 *East*, 357.)

The injunction is, accordingly, denied.

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July 27th.

Exceptions to an answer for impertinence as well as insufficiency, are made in writing, and referred, at the same time, to the master, and are disposed of together. (This is different from the practice of the court of chancery in *England*.)

The best rule to ascertain whether the matter be impertinent, is to see whether the subject of the allegation could be put in issue, or be given in evidence between the parties.

An answer ought not to go out of the bill, to state what is not material or relevant to the case stated in the bill. Long recitals, stories, conversations, and insinuations tending to scandal, are impertinent. So, facts not material to the decision are impertinent, and, if reproachful, are scandalous.

But if the plaintiff will put impertinent questions, he must take impertinent answers. It will depend, however, on the reason of the thing, and the nature of the case, how far a general inquiry will warrant an answer leading to particular details.

The defendant must answer directly and precisely to every material allegation in the bill, and not by way of a negative pregnant. The charges are not to be answered literally; but the defendant must confess or traverse the substance of each charge positively, and with certainty. Particular and precise charges must be answered particularly and precisely, and not generally, though the general answer may amount to a full denial.

If a fact is charged to be within the defendant's personal knowledge, he must answer positively, and not to his remembrance or belief; and as to facts not within his own knowledge, he must answer as to his information and belief, not as to his information or hearsay, without stating his belief one way or the other.

THE bill stated, that *William W. Sackett*, being indebted to the plaintiff, on the 30th of July, 1812, conveyed to him certain lots of land in the town of *Newburgh*, in *Orange* county, in trust for all his creditors. The plaintiff, at the same time, made a declaration of trust, that the plaintiff was to sell parts of the land unencumbered, and to pay off encumbrances, and then to pay the debts, and return the surplus to *Sackett*. The plaintiff took possession of the land and leased it. There was a mortgage on the land, to *William Lawrence*, and a prior judgment, of October, 1811, in favour of *Austin & Andrews*, who assigned it to the defendant,

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*Morrell*, on the 10th of *January*, 1812, for a less sum. There was also a judgment in favour of *E. Griswold*, of *June*, 1812, another in favour of *Duryee and Heyer*, docketed in *August*, 1812, who refused to receive payment and assign it. Executions were issued on the judgments, and the sheriff was required to sell in parcels; but, on *February*, 1813, he sold all the premises together, on all the judgments; and declared the sale to be subject to all encumbrances. *Morrell* and *Weller*, defendants, by their Attorney, *Sleight*, one of the defendants, purchased the property, at the sale of the sheriff, for 1,200 dollars; and a conveyance was accordingly executed to them. The bill charged fraud in the sale, on the part of the defendants, with a view to defeat the trust. Actions of ejectment were brought by the defendants, under the sheriff's deed.

A suit, by *Lawrence*, on his mortgage, was pending in chancery at the time of the sheriff's sale. The defendants put in separate answers, which are not necessary here to be stated. Numerous exceptions were taken to each of the answers, some for insufficiency and others for impertinence. On a reference to the master, the exceptions were generally allowed by him, and exceptions were taken, on the part of the defendants, to the master's report.

The cause came on to be heard on the exceptions to the report.

It was objected, on the part of the defendants, that it was not the course and practice of the court to make exceptions in writing to answers for impertinence, and especially joined with other exceptions for insufficiency; that exceptions for impertinence were first to be disposed of, before the answer was to be questioned for insufficiency. They cited 1 *Har. Ch. Pr.* 310. 324, 325. 14 *Ves.* 535, 536, 537.

*Burr*, for the defendants.

*P. A. Jay*, for the plaintiff.

THE CHANCELLOR. The *English* practice is not to make formal and special exceptions in writing, in the first instance, to an answer, for scandal or impertinence, as is done for insufficiency; but on a suggestion, by motion, of such matter, the answer is referred to a master to look into, and if he certifies against the exception, the plaintiff may except, in writing, to the report, and specify the particular parts which are scandalous or impertinent; and this reference for impertinence must precede one for insufficiency. I find, however, that a different practice prevails here in this court, and instead of a loose and general suggestion, the party does, in the first instance, what he eventually may be obliged to do under the *English* practice, and the objections to the answer, as well for impertinence as for insufficiency, go at once to the master, and are disposed of together. I do not perceive any strong objection to this mode of practice, which ought to induce me to interfere and change it. It may save time; for it admits of but one reference to the master, instead of two, and by reducing the exceptions to writing, and specifying the parts that are deemed impertinent, there is greater precision and certainty in the proceeding.

With respect to the merit of the exceptions, I would first, generally, observe, that from the short experience I have had in this court, it appears that much tedious discussion and delay have arisen from what are deemed defective or impertinent parts of an answer. The general rules on this subject are founded in good sense and sound justice, and they cannot be too well understood, nor too strictly enforced; the neglect of them will always receive disapprobation. If answers are to be made the vehicle of recrimination, or of matter of mere history, or inducement, or scandal, not pertinent to the case, and only useful to excite prejudice, the character of pleadings, in this court, would be degraded. And if the defendant is not compelled to a full, frank, and explicit disclosure of every thing properly required of him, and resting in his knowledge, information, or belief, one of

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1. As to *impertinent* matter, the answer must not go out of the bill to state that which is not material or relevant to the case made out by the bill. Long recitals, digressions, stories, conversations, and insinuations tending to scandal, are of this nature. Facts not material to the decision, are impertinent, and if reproachful, they are scandalous ; and, perhaps, the best test by which to ascertain whether the matter be impertinent, is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties. If, indeed, the plaintiff will put impertinent questions, he must take the answer to them, though it be impertinent ; but it will depend upon the reason of the thing, and the nature of the case, how far a general inquiry will warrant an answer leading to detail. The court will always feel disposed to give the answer a liberal consideration, on this point of matter irrelevant, and to consider whether it can have any real and proper influence upon the suit, *having regard to the nature of it as made by the bill.* (*Coopers' Treatise*, 318. *Mitford*, 248. *Peck v. Peck, Mosely*, 45. *St. John v. St. John*, 11 *Ves.* 526.) The case of *Smith v. Reynolds*, (*Mosely*, 69,) gives us a sample of matter, which was at the same time impertinent and scandalous. The plaintiff filed his bill to be relieved against a stale bond, and mentioned the fact of a subsequent bond, which he had *somewhat lost*, and by reason of which, he was obliged to sue the defendant in chancery, and had recovered. The defendant, in his answer, said, that he did not believe that the plaintiff had lost the bond last mentioned, *but believed that he had fraudulently concealed or destroyed it* ; and the chancellor, very properly, held, that the defendant had denied what was not material, and what the plaintiff did not require him to answer ; and that he had gone out of the way purely to reflect on the plaintiff.

2. With respect to the *sufficiency* of the answer, the general rule is, that to so much of the bill as is material and necessary for the defendant to answer, he must speak directly, without evasion, and not by way of *negative pregnant*. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively, and with certainty ; and particular precise charges must be answered particularly and precisely, and not in a general manner, even though the general answer may amount to a full denial of the charges. Indeed, as Lord *Eldon* observed, the policy of the proceedings in this court is, that a general denial is not enough ; but there must be an answer to the sifting inquiries upon the matter charged. If a fact be charged which is in the defendant's own knowledge, he must answer positively, and not to his remembrance or belief ; and as to facts not within his knowledge, he must answer as to his information or belief, and not to his information or hearsay merely, without stating his belief one way or the other. (*Bohun's Cur. Can.* 111. *Wyatt's P. Reg.* 13, 14. 1 *Har. Ch. Prac.* 302, 303. *Mitford*, 246, 247. *Cooper's Equ. Pl.* 313, 314.)

3. In the application of these general principles to the exceptions before me, the task is easy, because, by applying the case to the rule, it will readily be perceived that most of the exceptions are well taken for impertinence and for insufficiency. I shall not go into particulars. The exceptions allowed are noted, and they, for the most part, speak for themselves. Most of what was said by the defendant, *Morrell*, for instance, concerning the history of a voluntary deed of trust from *Sackett*, to him and others, was irrelative to the subject matter of the bill, viz. the fraudulent sale and purchase under the execution ; and it is, at the same time, replete with insinuations and reflections against the plaintiff. I accordingly allow twenty-five of the exceptions taken to the answer of *Morrell*, and ten of those taken to the

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*Mix v. Mix.* answer of *Weller*, and nineteen of those taken to the answer of *Sleight*.

The following exceptions to the answer of *George Morrell* are allowed, viz. the 2d, 3d, 6th, 7th, 9th, 11th, 12th, 14th, 16th, 17th, 19th, 21st, 22d, 25th, 26th, 27th, 28th, 29th, 31st, 32d, 33d, 34th, 35th, 36th, and 37th.

The following exceptions to the answer of *Hiram Weller* are allowed, viz. the 2d, 4th, 6th, 7th, 8th, 9th, 10th, 12th, 13th, 14th.

The following exceptions to the answer of *Solomon Sleight* are allowed, viz. the 1st, 2d, 3d, 4th, 7th, 8th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 24th, and 25th. The question of costs is reserved.

#### Exceptions allowed.

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July 28th.

#### ISABELLA MIX against M. P. MIX.

Pending a bill by a wife, for a divorce, to which the defendant had demurred, and before a hearing on the demurrer, on the petition of the plaintiff, setting forth that she was abandoned by the defendant, and wholly destitute of all means of support, and for carrying on the suit, the court, under the circumstances of the case, ordered an allowance of *thirty* dollars a month, to be paid by the defendant to the plaintiff, monthly, or to the register, for her use, until the further order of the court.

THE petitioner stated, among other things, that she was a native of *England*, and, on the 9th, of *October*, 1808, intermarried, in that country, with the defendant, a citizen of the *United States*. The defendant dissipated her fortune, to the amount of more than 3,000 pounds sterling ; and they came together to the *United States*, in *June*, 1809, and returned again to *England*, in *January*, 1810, where the defendant left her, in *June*, 1810, destitute of the means of support, and returned to the *United States*. Before leaving

her, the defendant had treated her with great cruelty and barbarity, &c. In the summer of 1813, she followed the defendant to the *United States*, and in *December*, of that year, they cohabited together in *New-York*, for a few days, when he abandoned her again, refusing her all aid or support. Being informed that he led a dissolute and adulterous life, she exhibited a bill of divorce, in this court, in *April*, 1814, to obtain a dissolution of the marriage, on the ground of his adultery, and for general relief. The defendant appeared and demurred to the bill.

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The petitioner further stated, that she was exposed to great distress for want of support, and was totally destitute of the means necessary to carry on her suit; that the defendant is an officer in the navy of the *United States*, and receives upwards of 70 dollars a month, for his pay and emoluments, and praying that he might be ordered, forthwith, to pay her 500 dollars, to enable her to prosecute her suit, &c. The facts stated in the petition, were sworn to the 20th of *July*, instant.

*Burr*, for the petitioner, cited 2 *Burn's Eccles. Law.* 433—436. *Oughton's Ordo Judiciorum*, 306., tit. 206. 309., sect. 7. 2 *Dickens' Rep.* 498. 582. *Cro. Car.* 16.

*Rodman*, contra.

**THE CHANCELLOR.** The statute gives this court jurisdiction over divorces, *a vinculo matrimonii*, for adultery, and over divorcees, *a mensa et thoro*, for cruelty, only in the case of parties of a certain designation and description.(a)

(a) The first section of the act makes it lawful, in cases where adultery is committed by husband or wife, "they being the inhabitants of this state at the time of committing such adultery, or when the marriage shall have been solemnized, or taken place within this state, and the party injured a actual resident in this state, at the time the adultery is committed, and at the time of exhibiting the bill, to exhibit a bill for a divorce," &c., *a vinculo*, &c. And the 10th section provides, in the like circumstances, in case of cruelty and inhuman treatment, that a bill may be exhibited for a divorce, *a mensa*, &c.

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(2 N. R. L. 197. s. 1 and 10.) Whether this be one of those cases in which the court is authorized to interfere and sustain the inquiry, remains yet to be ascertained. As the defendant has put in a demurrer to the bill, it would seem to be premature to make any order touching the maintenance of the wife, founded on the main subject matter of the bill, until the demurrer is disposed of. Perhaps, the court has no cognizance of the case, for the purpose of divorce. The bill goes for a dissolution of the marriage, on the charge of adultery, and in such cases the decree of divorce, under the statute, precedes a further decree or order for an allowance to the wife. But if no divorce can, or ought to be decreed, perhaps the bill may be sustained for alimony. The statute declares, "that whether the court shall decree a separation from bed and board, or not, it may make such order and decree, for the suitable support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may require." The petition states a case requiring immediate relief, as to support, and the existence of the relation of husband and wife must be deemed to be admitted. Though it would appear, from some of the cases referred to, and particularly those in *Oughton* and *Dickens*, that the courts, after the fact of the marriage is admitted, do allow to the wife a sum *for carrying on the suit*, as well as for intermediate alimony, and though I rather apprehend that this is a general rule, and applies whether the wife is plaintiff or defendant, in a suit with the husband, (*Fournel's Traite de l'Adultere*, 365.,) yet I do not think I ought to go so far in this case, when even the jurisdiction of the court, over the question of divorce, remains unsettled. The plaintiff ought to set down her cause for hearing, upon the demurrer.

I am willing, for the present, and under the circumstances of this case, to direct a monthly allowance of 30 dollars to the plaintiff, to be computed from the 20th inst., (being the

date of the petition,) and to be paid monthly by the defendant, to the plaintiff herself, or to the register, or assistant register, of this court, for her use ; and that this allowance continue until the further order of the court.

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Rule accordingly.

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**WILKIN AND OTHERS against WILKIN.**

*August 29th.*

If a bill, besides the usual prayer for general relief, contains a prayer for specific relief, the plaintiff is entitled to other specific relief, so far as it is consistent with the case stated in the bill.

The court will not sustain a bill for a partition, where the title is denied, or is not clearly established ; but, the bill will be retained, to give the plaintiff an opportunity to establish his title at law.

THIS case arose on a *rehearing*, against a decree of the late Chancellor, dismissing the bill.

The bill stated, that the plaintiffs are the children and heirs at law of *William Wilkin*, deceased. *John Wilkin*, their grandfather, before the 29th of *July*, 1752, purchased of the Widow *Phillipse*, and her children, a lot of land, (now in *Orange* county,) of about 500 acres, paid part of the purchase money, and entered into possession, but had no deed. He owed *Jacobus Bruyn* 200 pounds. On the 29th of *July*, 1562, he made his will, and among other things, devised as follows : " I do give, devise, and bequeath, unto my four sons, by name, *John*, *George*, *Joseph*, and *Jason*, and to their heirs and assigns for ever, all that lot of 500 acres of land, or thereabouts, and the farm whereon I live, with the appurtenances, by me purchased of

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Widow *Phillipse*, and her children, and for which I have no conveyance from them yet; the one half thereof to my said son *John*, his heirs and assigns, and the other half thereof unto my said three sons, *George*, *Joseph*, and *Jason*, their heirs and assigns; nevertheless, it is my will, and I do order and direct, that my said four sons, *John*, *George*, *Joseph*, and *Jason*, shall pay for the same, to *Jacobus Bruyn*, the sum of two hundred pounds, with interest, &c., the one half to be paid by my said son *John*, and the other half by my other three sons, *George*, *Joseph*, and *Jason*, each one equal third part thereof."

The testator died in possession, soon after making his will, leaving *William Wilkin*, his eldest son and heir at law, father of the plaintiffs and *James Wilkin*, and the four younger sons above named. The remainder of the purchase money was paid by the executors to the Widow *Phillipse* and her children, who, on the 20th *March*, 1753, according to the desire expressed in the will, conveyed the premises to *Jacobus Bruyn*, in fee, *in trust* for the four younger sons above named, on their paying the 200 pounds due him, &c. The four sons were in possession at the date of this deed, and continued in possession, occupying in common, for several years after. In 1764, the four sons, being in possession, made partition according to their rights under the will, and executed mutual releases; and, having paid to *Bruyn* the 200 pounds, &c., he, on the 8th of *July*, 1769, conveyed to them in fee, *to hold according to the will*.

*George*, one of the four sons, sold his share to one *Gillespie*, in fee. *John* and *Joseph* continued in possession until their deaths; but whether they and *Jason* (the defendant) occupied separately, according to the partition, or in common, the plaintiffs could not say. *Joseph* died in *October*, 1773, intestate, and without issue; and *John* died the 18th of *September*, 1775, intestate, and without issue. The eldest brother, *William*, father of the plaintiffs, died in *November*, 1787.

The plaintiffs claimed, under their father, the shares of *John* and *Joseph*, under the partition, alleging that the four brothers above named were seized in common, and that they are entitled to a *moiety*, and a *third of a moiety*, of the land. The defendant refused to let them into possession of their shares, &c. or to execute releases to them, pretending that the four brothers were joint tenants, and denying the partition. The plaintiffs commenced an action of ejectment, which was at issue ; but the will of their grandfather, the deed of the Widow *Phillipse* and her children, and the deed of *Brayn*, and the evidence and releases respecting the partition, being in the possession, or control, or knowledge of the defendant, the plaintiffs could not proceed in the action at law, without the aid of this court, to compel a discovery and possession of the said deeds, and the execution of proper releases, &c. And the plaintiffs prayed for a discovery ; and that the possession of the deeds might be delivered to them ; and that proper conveyances might be executed by the defendant ; and that the plaintiff might be relieved according to equity, and as the nature of the case might require, &c.

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The defendant, in his answer, admitted many of the facts stated in the bill ; but he denied that any *partition* was ever made, or any releases executed in pursuance thereof, except it might be as to the share of *George*, sold to *Gillespie*. He stated that the brothers lived together, and that no act was done by them to sever the possession, and that they had not accounted together ; that the defendant and his brothers always considered the land as held in joint tenancy, and lived in uninterrupted harmony together ; that since the death of his brothers, he had considered the land as his own, and had made valuable improvements on it.

Several witnesses were examined on both sides, and their depositions read at the rehearing ; but it is deemed unnecessary to state the evidence.

1814. *S. Jones, jun.,* for the plaintiffs, contended ; 1. That the devise to the four sons constituted them tenants in common, and not joint tenants ; and that the shares of *John* and *Joseph* descended to the plaintiffs, as their heirs at law. Both courts of equity and law lean in favour of tenancies in common. (*2 Atk. 55. 2 Bl. Com. 180. Co. Litt. 180. a. 190. b. 183. b. Litt. sect. 299. 1 Salk. 277.*) In joint tenancy the interests of all the tenants must be *equal* ; if they are *unequal*, it is a tenancy in common. (*Cro. Eliz. 33. Co. Litt. 193. a. Com. Dig. Estate. (K. 2.)*)

Here *John*, most clearly, had an undivided *moiety* of the whole. The other *moiety* was, also, held by the other three sons in common. The last clause in the will directs the three to pay the one half of the debt, which was the consideration, *each one equal third part thereof*. The payment being to be made by the owners, in distinct sums, and not in one aggregate sum, showed that they were tenants in common. (*1 Vern. 353. 3 Atk. 372. 730. 734. 3 P. Wms. 158.*)

2. The deed from *Bruyn*, of the 9th of *July*, 1769, gave the sons no other or different estate in the premises than they already had under the will of their father.

3. There is sufficient evidence to show a partition among the four brothers.

4. If there is not sufficient evidence, yet the court ought to have sustained the bill, and awarded a commission for partition. (*Amb. 236. Cooper's Equ. Pl. 134, 135.*)

Though there is no special prayer for a partition, yet, under the general prayer for relief, the plaintiff is entitled to any relief consistent with the allegations in the bill, equally as if it were particularly asked. (*Amb. 236. 12 Ves. 48. 62, 63. 2 Atk. 3. 141. 13 Ves. 119, 120.*)

A partition may be by *parol*. (*And. 50. Co. Litt. 250. 1 Lev. 103. 6 Co. 12.*)

*Harrison, contra,* contended ; 1. That this was a joint tenan-

cy, at least, as to the moiety held by the three sons. If it were considered a tenancy in common, and one of the three sons had died under age, the estate would have gone to the heir at law, which would have been contrary to the evident intention of the will.

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2. The three sons had a right to call on *Bruyn* to convey to them an estate, either in joint tenancy, or tenancy in common, as they might elect. If the deed gave a different estate from the will, it would prevail, and must be construed independently of the will. (4 *Cruise's Dig.* 457—459. tit. 32. ch. 24. s. 49, 50, 51.)

The *habendum* in the deed is, to hold according to the will; some doubt may, therefore, exist as to the true construction of the deed. The intention of the parties, so far as it may be collected from their declarations, was that it was an estate in joint tenancy.

3. The joint tenancy was never severed. There is no evidence of any partition. It is true that parol evidence of a partition is good, if the possessions of the parties have gone with the partition, and been held according to it. But that is not the case here: and a joint tenancy cannot be dissolved by parol. (*Co. Litt.* 187. a. 169. a.)

4. This is properly a bill for a discovery, to which the plaintiffs are entitled. But having obtained that discovery, they must go on to prosecute their suit at law. Under a prayer for general relief, they can obtain that relief only which is consistent with the *specific* relief asked. (2 *Atk.* 141. 3 *Atk.* 132. 2 *Ves.* 225. 1 *Ves.* jun. 426. 13 *Ves.* 114. 118. 2 *Atk.* 325.)

Where particular and general relief are prayed, the latter cannot be more extensive than the former, nor different in its nature.

5. It does not appear that the plaintiffs are the heirs of the person last seised; nor is there any allegation of a *seisin* in *William Wilkin*. The plaintiffs cannot entitle themselves to partition, until their title is clearly established,

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and they ought to be sent to a court of law for that purpose. Parties in this court, as well as at law, must recover *secundum allegata et probata*.

If tenants in common are entitled to favour, yet their claim, in this instance, is destroyed by the great lapse of time. This is a strong additional reason why the parties should be left to their legal remedies. A court of law is the proper *forum* to try the facts, as to the partition and legal title, and whether the title is not barred by the statute of limitations.

*Riggs*, in reply, insisted, that the bill ought, at any rate, to be retained; the prayer for discovery was sufficient to prevent its being dismissed. Besides, if the bill was defective, the plaintiffs were entitled to have it amended. The bill ought to be supported as to the discovery, at least; and, as an ejectment is pending, the bill should be retained, until the trial at law had ascertained whether there ought to be a *partition*.

The *seisin* of one tenant in common is the *seisin* of all. There is no evidence of an *actual ouster*; nor of a *disseisin* of *William Wilkin*, the son of *John*. If any of the plaintiffs are entitled to relief, it is sufficient to sustain the bill.

**THE CHANCELLOR.** This was not strictly a bill for partition. It was a bill for discovery, and for carrying into execution a partition, charged to have been formerly made. The defendant denies the title of the plaintiffs, and denies the fact of any partition. The parties have taken testimony on this point, and the plaintiffs have failed in the proof of their allegation, that a partition was formerly made, and still more in the designation of the specific portions assigned to each of the brothers. There is no evidence on the point, on which the court can act. It is, then, contended, that the bill is to be sustained for the purpose of awarding a commission to *make partition*, and that, although the specific prayer, in the bill, is for the delivery of possession, and for

the execution of proper conveyances according to the partition charged, yet that, under the general prayer for relief, a partition *de novo* may be decreed. With respect to this point, I apprehend the rule to be, that though the bill contain, as usual, a prayer for general relief, and, also, a prayer for specific relief, that the plaintiffs may have other specific relief, *provided it be consistent with the case made by the bill*. This was the rule laid down by Lord Erskine, in *Hiern v. Mill*, (13 *Ves.* 110, 120.,) and it seems to be agreeable to the principle formerly assumed by Lord Hardwicke. (*Grimes v. French*, 2 *Akt.* 141. *Dormer v. Fortescue*, 3 *Akt.* 132.) There does not appear to be any objection, in this instance, to the application of the rule, on the ground of surprise or prejudice; for one object of the bill, and of the specific prayer, is partition, not, indeed, a partition entirely new, but the complete execution of the one alleged to exist already in some imperfect degree. If, therefore, there was no question about the plaintiffs' title, I think I should have no doubt about the propriety of awarding a partition; for it would then be a relief perfectly consistent with the case made. But the title of the plaintiffs is denied, and the bill states, that the plaintiffs had commenced an action of ejectment at law, which was then at issue. The jurisdiction of chancery, in awarding partition, is not only well established by a long series of decisions, which are noticed by Mr. Hargrave, (N. 23 to *Lib. 3 Co. Lit.*) but it has been found, by experience, to be a jurisdiction of much public convenience. (*Calmady v. Calmady*, 2 *Ves.* jun. 570.) The court, however, does not sustain a bill of partition, unless the title be clear; and, in the case of *The Bishop of Ely v. Kenrick*, (Bunb. 322.,) the bill for partition was dismissed because the title was denied. In another case, (*Cartwright v. Pultney*, 2 *Akt.* 380.,) Lord Hardwicke observed, that where there were suspicious circumstances in the plaintiff's title, the court would leave him to law; and, from several cases, it appears to have been the course of the court, when the ques-

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tion of title, on a bill for partition, was in issue, to give the plaintiff a reasonable opportunity to try his title at law, and, in the mean time, to preserve the bill. (*Bliman v. Brown*, 2 *Vern.* 232., and the observation of the Master of the Rolls, in *Parker v. Gerard*, *Amb.* 236.) This appears to me to be the most advisable course in the present case. The questions on the title of the plaintiffs, are strictly legal questions, as, whether the estate created by the will, and by the deed, was an estate in joint-tenancy, or in common, and whether the plaintiffs are heirs of the person last seized. It may, also, be made a question at law, as has been suggested, whether the defendant be not protected from the claim by the statute of limitations ; this last consideration renders it still more proper that the plaintiffs should first be required to establish their title at law, before they come here for a partition. I shall, therefore, alter the decree heretofore made, for dismissing the bill with costs, and shall retain the bill, and leave the cause open until after the next circuit court, to be appointed and held in the county of *Orange*, when either party will be at liberty to move in the cause for such further order or decree as the case may require ; and all further questions are, in the mean time, reserved. A similar course was pursued in a case mentioned in note 1. to *Goodright v. Wells*, (*Doug.* 773.,) where the Master of the Rolls would not decide the legal question, but retained the bill for a twelve-month, to enable the plaintiff, in the mean time, to assert his right at law.

Rule accordingly.

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Moses

v.

MURGATROYD.

August 29th.

**Moses AND OTHERS against MURGATROYD AND OTHERS.**

Property held in *trust*, does not pass to the representatives of the trustee; but as long as it can be traced and distinguished, it enures to the benefit of the *cestui que trust*.

Where a *trust* is created for the benefit of a person, without his knowledge at the time, he may, afterwards, affirm the trust, and enforce its performance. Collateral securities to creditors are considered as *trusts* for the better protection of their debts, and equity will see that their intention be fulfilled.

Where an assignment is, on the face of it, *general*, yet if it be admitted to be different in its purpose, or for a specific security, *parol* evidence is admissible to show the real intent of the parties.

The administrator of a mortgagor is not as such, entitled to the surplus money arising from the sale of the mortgaged premises; but it is considered as part of the real estate, and goes to the heirs, and will be *assets* in their hands. And where the heirs were before the court, by their parent, it was ordered to be distributed, as *equitable assets*, among all the creditors, *pari passu*. But as the creditor has a remedy at law against an equity of redemption, it is questionable whether, before a sale of the mortgaged premises, it could be deemed equitable assets.

*Assets* may be partly legal, and partly equitable, and the court will discriminate in the distribution of them: following the rule of law, as to the *legal assets*, so as to prevent confusion in the administration of the estate; but directing the *equitable assets* to be applied rateably among all the creditors, without preference.

THE bill stated, that *Samuel G. Ogden*, on the 16th of December, 1805, being indebted to *Isaac Moses & Sons*, plaintiffs, in the sum of 12,412 dollars and 40 cents; to *Joseph Kauman*, plaintiff, in the sum of 5,891 dollars and 34 cents; and to *Obed Smith*, also plaintiff, in the sum of 2,523 dollars and 90 cents; for goods purchased of them, and shipped on board a ship, called the *Emperor*, gave to the plaintiffs, *Moses & Sons*, four promissory notes, payable in six months, to *Samuel Murgatroyd*, and endorsed by him; to *Kauman*, three notes, endorsed also by *Murgatroyd*, payable in six, seven, and eight months; and to *Smith*, one note, endorsed by *Murgatroyd*, for the amount of their respective debts.

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To indemnify *Murgatroyd*, and, also, *Gouverneur & Kemble*, for advances and responsibilities, *Ogden*, about the same time, by deed, assigned to them so much of the coffee, arising from a debt due to *Ogden* from the government of *Hayti*, as should be laden on board of the ship *Emperor*, belonging to *Ogden*, and which was expected to arrive at *New-York* from *St. Domingo*. As a special security to *Murgatroyd*, against his endorsements of the notes, *Ogden*, on the 12th of *February*, 1806, executed to *Murgatroyd* another deed of assignment of 100,000 pounds of coffee, or other goods of the value of 20,000 dollars, on board of the *Emperor*, parcel of the return cargo, the proceeds of the outward cargo to *Hayti*.

Before either of the notes became due, *Ogden* became insolvent, and notice of the non-payment of the notes was given to *Murgatroyd*, the endorser, who assured the holders that the notes should be paid out of the property so assigned to him by *Ogden*, as soon as the ship arrived; and relying on this assurance, the holders forbore to commence suits on the notes. In *July*, 1806, the ship arrived at *New-York* with a valuable cargo of coffee and other goods. On the 3d of *August*, 1806, *Murgatroyd* died intestate, and the defendant, *Thomas Murgatroyd*, administered on his estate. *Ogden* having assigned parts of the cargo to other creditors, it was agreed among all the parties concerned, and by *Thomas Murgatroyd*, the administrator of *Murgatroyd*, deceased, to submit the rights of the respective claimants to arbitration. On the hearing before the arbitrators, *Thomas Murgatroyd*, the administrator, claimed to be entitled to the benefit of the security, intended by the assignments from *Ogden*, to the amount of the notes which he was holden to pay by reason of the endorsements of the intestate. On the 2d of *October*, 1806, the arbitrators made an award, directing the distribution of the cargo among all the claimants, who acquiesced in the award, and received their proportions. The sum received by *Thomas Murgatroyd*, the administrator, amount-

ed, besides charges, to 19,000 dollars. While the arbitration was pending, the plaintiffs made repeated applications to *Thomas Murgatroyd*, for payment of the notes, and were always referred by him to the issue of the arbitration, when the notes should be paid ; and, after the award, he promised to pay the notes out of his proportion of the cargo, as soon as it was sold. One of the notes, to *Moses & Son*, was paid by the administrator, and one of the notes, to *Kauman*, was paid by the intestate, in his lifetime, but the other notes remain unpaid.

After the award, the administrator sold part of the cargo, but refused to pay the plaintiffs, alleging, that the intestate had incurred other responsibilities for *Ogden* which ought first to be secured.

The widow of *S. M.*, the intestate, afterwards intermarried with *G. Storm*; and *T. M.*, the administrator, confessed a judgment to her, as executrix of *S. Stevenson*, for 57,766 dollars and 13 cents, and pleaded that judgment, and a deficiency of assets, in bar of the demands of the plaintiffs.

The plaintiffs alleged that this judgment was confessed, and kept on foot, *per fraudem* ; or, if it was not, still it ought not to be paid, as *Mrs. Storm* was not a creditor of *Ogden*, or, if she was, she had no *lien* on the property.

By an agreement between the plaintiffs and defendants, the property received by the administrator, under the assignments of *Ogden*, and remaining in his hands unappropriated, amounting to 11,500 dollars, was placed in the hands of *C. Wilkes*, in trust, subject to the final order and decree of the court in this cause.

The intestate, *S. M.*, died seised of real estate of considerable value at *Harlaem*, which came to the possession of his heirs ; and which was under mortgage to one *Lawrence*, who filed a bill in *May*, 1807, to foreclose, and the property was afterwards sold by a master for 7,500 dollars, but no deed given. The administrator had applied, in *April*, to the surrogate, on the ground of a deficiency of personal assets, and obtain-

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1814. Moses v. Murgatroyd. ed an order, on the 12th of June, 1807, for the sale of the real estate of the intestate, and the proceeds to be brought into the hands of the surrogate, to be distributed according to law ; but the surrogate suspended the proceeding on the order, and consented to the order of sale by the master, with a view to secure the surplus moneys arising from the mortgaged premises. The bill of the plaintiffs called for an account, &c. and that the moneys arising from the sale of the cargo might be applied to the payment of the notes, and not to the payment of the intestate's debts generally ; and that the surplus proceeds of the mortgaged premises might be distributed equally, without a preference of the judgment.

T. *Murgatroyd*, in his answer, admitted that the notes were given and endorsed, and the protest and notice to the endorsee ; that the first assignment, by *Ogden*, of the 20th of December, 1805, was a quantity of coffee, particularly designated, but denied that it was made specifically to secure the endorsements, or notes, but was intended as a security against all the engagements by *S. M.* for *Ogden* ; that the second assignment, of the 12th of February, 1806, did not relate to any specific liability, but was a general security, like the other, for all advances and responsibilities on account of *Ogden* ; that the only specific security given by *Ogden*, was of the *freight* of the ship, which was assigned on the 4th of May, 1806, and when the ship arrived, *Ogden* himself received the freight, and became insolvent, so that none of it came to the hands of *S. M.*, or of the administrator. He denied that the intestate ever admitted that the assignments were specifically to secure the endorsements, or that he promised to pay the notes out of the proceeds. He admitted that *Ogden* made other assignments of goods expected in the ship *Emperor*, to other creditors ; that the arbitrators awarded as alleged by the plaintiffs ; that he exhibited the three assignments to the arbitrators, and claimed, under them, to be allowed for all the responsibilities and pay-

ments of the intestate for *Ogden*, amounting to 31,276 dollars and 50 cents, including the endorsements, a note of 5,000 dollars, and a check of 5,000 dollars ; but he denied that he made any claim on account of the notes, more than for any other item. He admitted that all parties acquiesced in the award, and that he received under it, out of the assignment, 16,270 dollars and 55 cents ; but denied that he had promised to pay the notes out of the proceeds. He admitted the payment of one of the notes to *Moses*, which had been negotiated to *J. R. Livingston*, but said that it was paid in expectation of receiving the *freight*, and not under the idea that the notes had any preference on the cargo. That he had refused to pay the notes out of the money he had received, because he had other demands against *Ogden*, to wit, a note dated the 14th of *January*, 1806, for 5,000 dollars, for advances made to him by the intestate, and a check of *Ogden*, dated the 10th of *April*, 1806, for 5,000 dollars, which was unpaid ; to satisfy which demands, he insisted he had a right first to apply the proceeds, and also to reimburse himself the sum paid to *J. R. L.* for the note, and also the amount of the note to *Kauman* ; that the intestate, as administrator, with the will annexed, of *Susannah Stevenson*, appropriated to his own use the sum of 57,768 dollars and 13 cents, and for that balance the defendant confessed the judgment to *Susan Storm*, &c. the devisee under the will of *Mrs. Stevenson*, which was entered up the 22d of *December*, 1806 ; which judgment was *bona fide*, and had been pleaded by him, as stated in the bill ; and he denied that it was fraudulent, or done under the indemnification of any person whatever ; and he insisted that he was bound by law, to consider all the proceeds in his hands as *assets*, to be applied, in the course of administration, according to the general rules of law ; and that he was, therefore, bound to apply all the property of the intestate, in his hands, in satisfaction of that judgment.

The defendant admitted, that the amount of the property in the hands of *C. Wilkes* was 11,150 dollars and 50 cents,

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the whole of which he claimed as *assets*. The defendant admitted the existence of the mortgage stated in the bill, and the suit and sale, but said that the sale had been since vacated, but for what reason he did not know.

Garret Storm, and Susan, his wife, (formerly Susan Murgatroyd, widow of the intestate,) Charles Wilkes, and William Lawrence, put in their joint and several answers, in which the principal facts, as stated in the answer of T. Murgatroyd, were admitted.

*Samuel G. Ogden, the assignor, who was examined as a witness, stated, that all the notes given to the plaintiffs were for goods purchased of them, and shipped in the *Emperor*, on the voyage to *Hayti*; that before *Samuel Murgatroyd*, the intestate, consented to endorse the notes, the witness promised to secure him, by the assignments; and that he made the assignment of the 12th of *February*, 1806, for the purpose of securing *S. M.* against the *said endorsements*; and that, as *S. M.* afterwards expressed fears as to the sufficiency of the security, the witness, in *May* following, assigned to him the freight; that the assignment made by him, on the 16th of *December*, 1805, had no reference to the notes, but was intended as a general security; that the note of 5,000 dollars, and the check for the like sum, were not included in the security provided by the assignments of the 12th of *February*, and of *May*, 1806, but were intended to be secured by the one in *December* preceding; that "he always considered that *S. M.* understood, and was impressed, that the assignments of the 12th of *February* and 14th of *May*, 1806, were made specifically to secure the *said endorsements*, and no other notes."*

*J. G. Bogart, another witness, deposed, that he applied to *T. M.*, the administrator, to pay one of the notes, and he promised to pay it out of the proceeds of the cotton and coffee, which, he understood from *T. M.*, were assigned to *S. M.*, the intestate, to secure him against the *said endorsements*.*

J. Wilkes, the notary, who demanded payment of the notes from *S. M.*, testified that the intestate told him, that they would be paid on the arrival of the ship, which had been assigned to him by *Ogden*, as security for his endorsements. *D. A. Ogden* also deposed, that he understood from *S. M.*, about the time the notes became due, that he had received from *Samuel G. Ogden*, as collateral security for the payment of the notes and of all responsibilities of the same nature, an assignment of property ; that *T. M.*, the administrator, admitted to him, that the assignment of the 12th of February, 1806, was made to secure the payment of the notes, for which he, *S. M.*, had become liable for *S. G. Ogden* ; and the impression of the witness was, that *T. M.* said he should apply the proceeds of the coffee to the payment of the notes, to secure which the assignment was made.

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*Harrison* and *Hoffman*, for the plaintiffs, contended, that the evidence fully established the fact that the assignment of the 12th of February, 1806, though absolute on the face of it, was given and intended only as a security for the notes due to the plaintiffs ; that it was a settled principle that a specific fund, assigned to pay a debt, should be always so applied ; and as long as the fund could be traced, the trust must follow, and attach to it. (1 *Equity Cas. Ab.* 93. *K. pl. 5. Bac. Ab. Obligation*, (B.) 168. *Kip v. Bank of New-York*, 10 *Johns. Rep.* 63.)

Where a deed is, on the face of it, contrary to the intent of the parties, it is, *prima facie*, fraudulent, and parol evidence is, therefore, admissible to show the intent ; and it was admitted, on all hands, that the assignment, though general, was intended as a specific security.

In *Neilson v. Blight*, (1 *Johns. Cas.* 205.,) it was decided that where a trust was created for the benefit of a person, though without his knowledge at the time, he might affirm the trust, and enforce its execution. There could be

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no doubt as to the equity of the case ; and it was equally clear, that the surplus moneys in the hands of the administrator, arising out of the sale of the real estate, were *equitable assets*. An executor, though entitled to the surplus of the personal estate, cannot take the proceeds of the real estate. An equity of redemption is equitable assets ; and on the principle that equality is equity, a court of equity will always endeavour to make equitable assets, by disregarding all preferences among the creditors. (3 Bac. Ab. 58. 1 Salk. 79. s. 1.) This court, then, ought to lay hold of the fund, and distribute it rateably among all the creditors.

*Wells* and *Colden*, contra, contended, that the plaintiffs had no equity, in preference to the infant children of the intestate. The principal object of the plaintiffs, in coming into this court, was to set aside the judgment, on the allegation of fraud ; but that allegation had been fully disproved, and the judgment shown to be *bona fide*.

The plaintiffs seek to alter the legal distribution of the *assets* in the hands of the administrator, and, on some pretext of equity, to gain a preference over the judgment creditor, and against the infant children of the intestate. The administrator had a right to confess the judgment, and thereby give a preference ; but the plaintiffs insist that there are certain liens and trusts which ought to change the legal destination of the property. The credit was given to the personal responsibility of the intestate, as endorser, and to *Samuel G. Ogden*, as maker of the notes. The plaintiffs did not look further, and further they ought not to be allowed to go. The intestate was to be indemnified, for lending his name and money to *Ogden*, by the assignments. Third persons, not privies to an assignment made for the benefit of *S. M.*, and now claimed for his children, ought not to take that benefit.

The note and check, which are to be refunded, will nearly absorb all the money the administrator has received ; and this court can distribute only the surplus that may remain, after deducting what had been advanced by the intestate.

The assignments of the 20th of *December*, and 12th of *February*, are both general ; but that of the 14th of *May* is a specific security. The answer expressly denies that the assignment of the 12th of *February* was specific. Can *parol* evidence be admitted to contradict, or alter the operation of that assignment ? Parol trusts are void by the statute ; and to permit parol evidence, in this case, would be against the policy of the statute, and of dangerous consequence. The answer denies all the allegations on which the plaintiffs rest their claim to the interposition of this court. The evidence, in a great degree, confirms the answer, that the assignments of *December* and *February* were *general*, and intended to cover all the responsibilities of the intestate for *Ogden*. The assignment of the freight, in *May*, being intended to be *specific*, was so expressed.

Where a general assignment is given by way of security, and without any specific destination, it may be applied by the assignee to any debt or demand due to him, at his election or discretion.

Again, there is no colour of equity for considering the surplus money in this court, on the sale of the mortgaged premises, as equitable assets. This court will not consider itself as ancillary to the surrogate ; and because, by chance, the money has come into this court, decree according to the rules of the surrogate's court. The proceedings before him were abandoned, and the surplus ought then to be distributed according to the rules of law.

**THE CHANCELLOR.** The plaintiffs found their claim to the proceeds of the cargo, assigned by *Ogden* to *S. Murgatroyd*, on the 12th of *February*, 1806, as being property held by the intestate, in trust, for the payment of their notes.

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If this be once conceded or ascertained, as a matter of fact, the conclusion follows, of course, that the proceeds were not assets in the hands of *Thomas Murgatroyd*, the administrator, for the general creditors of his intestate, but they existed in his hands subject to the trust. The cases of *Deering v. Torrington*, (1 *Salk.* 79. pl. 1.,) and of *Kip v. The Bank of New-York*, (10 *Johns. Rep.* 63.,) show that property held in trust does not pass to the representatives of the trustee discharged of the trust, but, if it can be traced and distinguished, it shall enure to the benefit of the *cestuy que trust*.

The assignment to *Samuel Murgatroyd* was absolute on the face of it; but it is admitted by the answer of the administrator, and supported by all the proof in the cause, that the assignment was made, and taken by him, as a security or indemnity merely; this fact being admitted, the party interested has a right to go into parol proof to explain the extent and object of the security. The admission of parol proof, to show the intent, becomes indispensable. The defendant, (the administrator,) in his answer, admits the assignment to be different from what it purports to be. It does not, therefore, truly express the intent of the parties; and parol evidence is, then, clearly admissible to show that intent. The deed was false on the face of it, by the admission in the answer, but that admission does not go to impeach the general fairness of the transaction; the difference between the deed as expressed, and the deed as intended, may have arisen from mistake, or ignorance, or accident; and it becomes necessary, in order to attain justice, that the court should let in parol proof to discover, and carry into effect the real intention of the parties in creating the security.

I have no doubt, then, of the competency of the parol proof in this case; and the weight of that proof goes to establish the fact for which the plaintiffs contend, that the assignment was made to indemnify *S. Murgatroyd* against the endorsement of the notes in question. This appears

from the evidence of *Ogden*, who made the assignment, and who testifies that he made it for that specific purpose, and for no other, and that he always considered that *S. Murgatroyd*, the assignee, so understood it. This appears, also, from the testimony of *J. G. Bogart*, and of *D. A. Ogden*, who state, that they understood the same from the administrator, *Thomas Murgatroyd*; and it further appears, from the evidence of *Wilkes*, that when he demanded payment of the notes of the intestate, he admitted, in respect to the ship, an assignment to him, by *Ogden*, as security for his endorsements. We have, then, a very full and explicit admission of the fact from all the parties concerned; from *Ogden*, who made the assignment; from *Samuel Murgatroyd*, the assignee; and from *Thomas Murgatroyd*, his administrator, and one of the defendants.

I shall then consider this fact as well made out, viz. that the assignment of the 12th of *February*, 1806, though absolute on the face of it, was intended, by the parties to it, to be a security only to the intestate for his endorsement of the notes in question. This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security, given by their principal debtor to his surety; and the case of *Maure v. Harrison*, (1 *Eq. Ab.* 93. *K. 5. Mich.* 1692.,) is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt; and it is the duty of this court to see that they fulfil the design. And whether the plaintiffs were apprized, at the time, of the creation of this security, is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge, they were entitled to affirm the trust, and to enforce its performance. This was the principle assumed in the case of *Neilson v. Blight*, (1 *Johns. Cas.* 205.)

The plaintiffs are, accordingly, entitled to the exclusive appropriation of the 11,150 dollars and 50 cents, in the

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1814. hands of *Charles Wilkes*, with the interest thereon, towards the payment of their notes.

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The next question is, whether the surplus moneys now in this court, and arising on the sale of the lands mortgaged to Lawrence, shall go to the administrator for distribution, where they will be absorbed by the judgment confessed, or whether they shall be distributed under the direction of this court, *pro rata*, among all the creditors, as equitable assets. The administrator is not, as such, entitled to this surplus ; it is part of the *real estate*, and goes to the heirs, and would be assets in their hands. The heirs appear to be infants, and their mother, *Susan Storm*, is before the court in the character of a creditor, in behalf of her children, and holding a judgment confessed by the administrator. I am inclined to consider the moneys in question as equitable assets. It was held, in *Plunket v. Penson*, (2 Atk. 290,) that the equity of redemption of a mortgage, in fee, forfeited in the lifetime of the mortgagor, was equitable and not legal assets ; and the same doctrine was held by the Master of the Rolls, in the case of *Sir Charles Cox's creditors*, (3 P. Wms. 341.) But as the creditor has a remedy at law, with us, against an equity of redemption, it might be doubted whether it could be deemed equitable assets while unsold ; but after it is converted into money, under the decree of this court, I think the money is to be treated as equitable assets ; for the creditor must come here for relief, as the money is placed under the jurisdiction of the court. In *Freennoult v. Dediire*, (1 P. Wms. 429,) it was said, that where the estate descends to the heir, it is legal assets, but if the heir sell the land before suit, it then becomes equitable assets. The general doctrine is to encourage, as much as possible, the idea of equitable assets, because equality in the payment of debts is equity, and the rule of distribution, in chancery, is founded on principles of natural justice. Assets may be partly legal and partly equitable, and the court will, in such case, discriminate, and direct that such as

are legal, be applied in a course of administration, and such as are equitable, be applied *pari passu*. This was done in *North v. Cox*, (3 P. Wms. 344. n. 3.) In the distribution of legal assets, this court follows the rule of law, to prevent confusion in the administration of the estate; but whenever the assets are considered as equitable, then it is well and uniformly settled, that they are to be distributed among all the creditors, *pro rata*, without giving preference. *Morris v. Bank of England*, (2 Cas. temp. T. 213.)

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I conclude, then, that the surplus moneys now in court are to be treated and distributed as equitable assets; and as no objection was made to the want of proper parties before the court, the decree must be entered accordingly;

1. That the plaintiffs are entitled to the 11,150 dollars and 50 cents, in the hands of Mr. Wilkes; and,
2. That the surplus moneys, arising upon the sale of the mortgaged premises, ought to be distributed as equitable assets, rateably among all the creditors.

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#### G. PHILLIPS against THOMPSON AND OTHERS.

July 5th, 6th,  
7th, 8th, 9th,  
and August

Declarations of a person, not a party in interest, nor a party to the suit, and 29th. who is a witness in the cause, are not competent evidence.

A plaintiff cannot read his own answer to a bill of discovery in a cross-suit, in evidence, unless the defendant chooses first to produce it.

A contract made by an owner of land with the commissioners, under the act relative to dredging the drowned lands in Orange county, (sess. 30. ch. 25,) by which they were allowed to use each bank of the river Wallkill, &c. which they might find necessary, in removing all obstructions, and in deepening and widening the river, &c. and to use, occupy, and enjoy the same, and for which they were to pay a compensation to the owner for the damages, and who agreed to allow them to cut a canal through his lands, is a contract concerning an interest in lands, within the purview of the statute of frauds.

To entitle a party to take the case out of the statute, on the ground of part

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performance of the contract, he must make out, by clear and satisfactory proof, the existence of the contract as laid in his bill. And the act of part performance must be of the identical contract set up by him. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill.

The commissioners, under the act above mentioned, had no right to use the lands of the plaintiff, or to remove or destroy his property, without a valid and legal contract with him for that purpose, or until compensation had been made and tendered to him, according to the act.

And where a bill, filed against the commissioners to compel a performance of a parol contract to compensate the party, could not be sustained, on the ground of its not being a valid contract within the statute of frauds; yet this court retained the bill, and awarded an issue of *quantum damnum*, to assess the damages sustained by the plaintiff, by the acts of the defendants, as the plaintiff had sustained an injury for which he ought to be compensated, and for which he had no remedy, or, at best, a doubtful and inadequate one, at law.

THE bill, which was filed in *July*, 1809, stated the act of the legislature, passed the 6th of *March*, 1807, entitled "an act to raise moneys to drain the drowned lands in the county of *Orange*," (sess. 30. ch. 25.) By the first section of the act, three inspectors were appointed to determine the number of acres belonging to each owner of the tract of drowned lands, which, in their opinion, might be benefited in removing the obstructions and straightening the river *Wallkill*, and the two streams which fall into it, in that tract; and to determine the proportion that each owner should pay, per acre, of any sum of money to be raised for the purpose, and to make a roll thereof, &c.

By the 4th section, *John Townsend, George D. Wickham, Peter Townsend, Moses Phillips, and William Thompson*, were appointed commissioners, with full power to remove all obstructions out of the *Wallkill*, &c.; to deepen, widen, and straighten the same, &c.; and further, to use and occupy a sufficient proportion of the lands, adjoining each bank of the river, on which they may find it necessary to lay the rocks, stone, earth, &c.; which they may have occasion to take out of the same, &c.; and that the commissioners, and their

successors, might contract with the owners of the lands so to be used, for the damages which they might sustain by reason thereof; and in case of disagreement, the damages were to be assessed by three indifferent freeholders, to be mutually chosen for the purpose; and if the owners should refuse or neglect to choose the appraisers, the commissioners might apply to the *Orange* court of common pleas, who were empowered to appoint the appraisers.

By the 11th section, the commissioners, or their successors, or a majority of them, if necessary, in exercise of their powers, &c. might remove or destroy any mill or mill dam, or any other erection or improvements, owned by any person or persons, on the said river, &c. And that all persons sustaining damage or injury, by the exercise of the powers granted to the commissioners, &c. should receive indemnity and compensation for such damage or injury, the commissioners, &c. and the persons sustaining the damage or injury, might treat and agree on the sums to be paid as compensation, &c.; and in case of agreement, the commissioners were directed to pay the sums agreed on out of the moneys coming into their hands under the act; but in case of disagreement between the parties, &c. the persons claiming compensation might apply to the Chancellor, or one of the judges of the supreme court, who was directed to appoint five reputable and disinterested freeholders of the county, to determine the sum, or sums, which ought to be paid a compensation, &c. And it was made the duty of the commissioners to pay the sums, so determined on as compensation, out of any moneys coming to their hands, &c. to the persons entitled to such compensation; and that until such sums should be paid, they should carry interest, and be a *lien* on the lands intended to be benefited by the draining aforesaid, in the nature of a mortgage; and that the said lands might be proceeded against in a court of chancery, as mortgaged premises, as nearly as the nature of the case would

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1814. admit, and might be sold to raise the sum or sums to be paid.

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THOMPSON. The bill further stated, that the plaintiff, at the time of passing the act, was owner of land, a dam, and mills, on the outlet of the *Wallkill*; that the commissioners, named in the act, took upon themselves the burthen of their trust, and determined that the plaintiff's dam must be lowered, and a canal cut down to the same, through the lands of the plaintiff; that, about the 23d of *May*, 1807, the commissioners and the plaintiff agreed, that the plaintiff should lower his dam *four feet*, by the 1st of *May*, 1808, and should allow the commissioners to cut a canal through his lands, and that the commissioners should pay to him, as a compensation, &c. 6,000 dollars, and the sum of 800 dollars more; if he should lower the dam by the 1st of *July*, 1807; that, in pursuance of this agreement, the commissioners, in the course of the year 1807, cut the canal, but did not request the plaintiff to lower his dam before the 1st of *July*; that he lowered it *four feet*, according to his agreement, in *April*, 1808; that the three inspectors appointed by the act, made an estimate of the number of acres of each owner benefited by the operation, and what sum each ought to pay for such benefit, and filed the same according to the direction of the act; that the commissioners proceeded to assess the said owners of lands, and collected large sums of money, enough to pay the plaintiff the sum of 6,000 dollars, when due; and for which sum the plaintiff has a *lien* on the said lands, in the nature of a mortgage; that the defendants were elected commissioners, pursuant to the act, and acted as such, in 1809, the time of filing the bill, &c. The plaintiff prayed a *discovery* of the moneys collected, the names of the owners of the lands, and a description of the lands bound by the *lien*; and that the defendants might be decreed to pay to the plaintiff the 6,000 dollars, &c.

Two of the defendants, *Jennings* and *Bradner*, who were elected commissioners after the alleged agreement with the

plaintiff, demurred to the discovery, and answered to other parts of the bill, denying the original agreement; and stating that the lands were occupied without the consent of the plaintiff; and that, in the spring of 1808, the commissioners lowered the dam, intending to pay a compensation for all damages; and that the mills were previously burnt, &c.

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The defendants, *Thompson* and *Peter Townsend*, two of the original commissioners, and who continued in office, in their answer, admitted the ownership of the land by the plaintiff, &c.; that the commissioners determined to lower the dam, but the plaintiff denied their power to do so; that they consented to treat with the plaintiff, and received his written propositions, by which he offered, in consideration of 6,000 dollars, to permit the canal to be cut through his lands, and lower his dam four feet by the 1st of *May*, 1808; and that if he might have the right to raise it one foot, when the water was only one foot above the dam, he would accept 4,800 dollars, or 2,500 dollars, if he might raise it three feet, and erect a new dam when the draining was completed; and that, if he should lower his dam four feet by the 1st of *July*, 1807, he should receive the further sum of 800 dollars. That before the propositions were considered by the commissioners, a majority of them had entered into a verbal contract with *Peter Townsend*, one of the commissioners, to execute a large part of the draining, which he agreed to perform in 1807, for the sum of 54,000 dollars; but this work could not be done, unless the plaintiff lowered his dam four feet; and the commissioners, therefore, agreed to accept the proposal of the plaintiff to lower his dam by the 1st of *July*, 1807, and entered into a verbal agreement with him for that purpose; and the plaintiff, in consideration of 6,800 dollars, agreed to permit the canal to be cut, and to lower his dam by the 1st of *July*, 1807. That this agreement was precise and positive as to the time the dam was to be lowered, and there was no other agreement, nor any agreement as to lowering the dam by the 1st of *May*, 1808. That on the suggestion of *Moses*

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*Phillips*, one of the commissioners, and father of the plaintiff, the parties agreed to reduce the contract to writing, and *Moses Phillips*, for that purpose, applied to *David Mason*, to have the agreement in writing, and ready for execution at a meeting of the commissioners to be held in June, 1807, for that purpose. At that meeting, a majority of the commissioners, at the instance of *W. Wickham*, a large proprietor of the lands, abandoned the agreement, and changed the plan of operations. No written contract was presented to the commissioners or signed by the parties. That under the new plan of operations, *Moses Phillips*, one of the commissioners, as chief superintendent, took possession of the ground, with the express or implied assent of the plaintiff, and with a mutual understanding that compensation should be made; but they denied that any thing was done by the commissioners in pursuance, or in part performance, of the verbal agreement; and that, if any such thing was done by *Moses Phillips*, it was without the assent, intent, or knowledge of the rest of the commissioners. That one of the defendants, *Thompson*, told the plaintiff that the commissioners did not mean to adopt the agreement: that the plaintiff lowered his dam in April, 1808, but the mills, before that time, were burnt down. That the damage in taking down the dam was inconsiderable; that the assessments made on the owners amounted to 26,506 dollars, all of which sum, except 8,000 dollars, had been expended, and that the defendants had no means of collecting the 8,000 dollars, but by a sale of the lands assessed. That the verbal agreement, set forth by the plaintiff, is void by the statute of frauds, &c.

The answer of *George D. Wickham*, another defendant, agreed substantially as to the facts stated in the answer of *Thompson* and *Townsend*, except that he dissented from the agreement with the plaintiff and with *Townsend*. He denied that the commissioners took possession under the agreement; but that they took possession after the 1st of

*July, 1807, after a failure of the plaintiff to perform, and under a mutual understanding of compensation, &c.*

The following is the substance of such parts of the evidence as it is thought material to state.

A witness, *Moses Phillips*, (one of the commissioners,) on the part of the plaintiff, stated, that on the 24th of *May*, 1807, the commissioners admitted to him, that they had made the agreement as set forth by the plaintiff; and that *Thompson*, the president, and *Peter Townsend*, the secretary, afterwards admitted the same.

*Lemuel Judson*, another witness, proved the confession of *Peter Townsend*, in *May*, 1807, that such an agreement had been made, and that all the commissioners, in *June*, admitted the same, and that *Thompson*, afterwards, in *July* or *August*, and in *December*, 1807, admitted the same thing. *Moses Phillips*, jun., also proved the confession of *Thompson*, in *July*, 1807, and in *May*, 1809, that such an agreement had been made with the plaintiff.

*Henry W. Phillips* proved the confession of *John Townsend*, one of the commissioners, in *May*, 1807, to the same effect.

*John Kinney* deposed, that the commissioners admitted, in *September*, 1807, that the plaintiff was to lower his dam four feet the next spring.

Several witnesses proved the occupation of the ground by the commissioners, the digging the canal, &c. in the autumn of 1807, and in 1808.

On the part of the defendants, a witness, *John Townsend*, who was a commissioner, proved a verbal agreement with the plaintiff, that he was to have 6,800 dollars, if the dam was lowered by the 1st of *July*, 1807, and that the contract was to be reduced to writing. He also proved the contract with *Peter Townsend*, which was to be executed by the 1st of *January*, 1808, and which was also to be reduced to writing.

Another witness, *James Moore*, proved a verbal contract

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with *Peter Townsend*, in *May*, 1807, which was to be performed by the 1st of *January*, 1808; and, that to effect it, it was necessary that the dam of the plaintiff should be lowered four feet. He stated, that the agreement with the plaintiff was as set forth in the answer of *Thompson* and *Townsend*, and that it was made to enable *Peter Townsend* to proceed in the execution of his agreement, and that both agreements were to be reduced to writing in *June*; that the plaintiff confessed to him that he was bound to lower his dam by the 1st of *July*, and that after the meeting, in *June*, the plaintiff said that he was not bound to lower his dam, unless the commissioners secured to him 6,800 dollars, and said they were to pay him that sum, provided he lowered the dam by the 1st of *July*. The witness stated, that the contract with *Townsend* was abandoned at the meeting of the commissioners, in *June*.

*Joseph Jefferson*, also, deposed, that he understood from the plaintiff, in the fall of 1807, that the dam was to be lowered prior to the operation of *Townsend's* contract; and that the plaintiff was to receive 6,800 dollars.

*William Townsend*, a witness, stated, that, at the meeting of the commissioners, in *June*, he heard *Moses Phillips* say, that he had taken great pains to have the contract with the plaintiff completed, and that he had employed *D. Mason* to draw it, and complained of the impropriety of the commissioners refusing to ratify it. He understood, at that meeting, that the contracts were abandoned, in consequence of the opposition of *Wickham*.

*D. Mason* deposed, that, in *June*, 1807, *Moses Phillips* and *Peter Townsend* requested him to take minutes of the contract with the plaintiff, in order to reduce it to writing; and that he took the minutes according to their directions as commissioners; that the dam was to be lowered, by the plaintiff, by the 1st of *July*, for 6,800 dollars. Minutes of the contract with *Townsend* were taken at the same time, and for the same purpose, and were to be executed by the

parties. The minutes were taken on the day of the meeting of the commissioners, in June; but the contracts were not completed and furnished by him, in consequence of the advice of *Wickham*. The minutes taken by *Mason*, which were exhibited, stated the contract as set forth in the answer of the defendants.

Two other witnesses stated, that, at the meeting in June, they understood that the contracts were abandoned.

There was a *cross bill*, also, filed and pending.

The cause coming on to a hearing, several preliminary motions were made by the counsel, on each side, to suppress parts of the testimony taken before the examiner as incompetent, and, for that purpose, they entered into a laborious examination of the answers of the witnesses, on each side, to the interrogatories both direct and cross. Many parts of the depositions were struck out, as amounting only to hearsay evidence, or to a loose and general understanding and belief. And in the course of this discussion, it was moved on the part of the defendants, to suppress the whole testimony of *Moses Phillips*, the plaintiff's father, on the ground of misbehaviour in his answers to the 6th, 8th, and 10th cross interrogatories.

July 6th.

To oppose the motion, the certificate of the examiner was read, exculpating the witness, and showing that the defect appearing in the answers, was not owing to the want of a full disclosure by the witness, but to the mode of taking the answer down, in which the examiner, in endeavouring to follow the spirit of the 29th rule of June, 1806, may have aimed at too much brevity. The following authorities were also cited by the plaintiff's counsel, to show the practice in the case of defective answers given by witnesses, viz. *Wyatt's Pract. Reg.* 419. 172. *1 Sol. Guide*, 275, 276. *1 Har. Pract.* 489, 490. 514. 519, 520. 542. *Dickens*, 288. 358. *2 Ves.* 106.

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misbehaviour of  
a witness in his  
answers to inter-  
rogatories.

*J. Radcliff*, and *Riggs*, for the plaintiff.

*T. A. Emmet*, and *Robinson*, for the defendants.

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THE CHANCELLOR. The motion to suppress the deposition of the witness is denied, as the charge of misbehaviour is done away; but if it should be deemed material, hereafter, in the discussion of the merits, to have a more full and perfect answer from the witness, the court will direct a further examination of him, on those interrogatories, either before the examiner, or in open court. The cases cited show, that either course may be adopted, in the discretion of the court, the better to inform its conscience; and if a further deposition be taken, it need not be published, nor a further argument had, unless the justice of the case should seem to require it.

The counsel for the defendants then raised an objection to the answer of *Moses Phillips*, jun., one of the plaintiff's witnesses, to the 4th direct interrogatory, because he detailed the declarations of *Moses Phillips*, one of the commissioners under the act, but not a defendant.

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Declarations of
a person not a
party in inter-
est, nor a party
to the suit, and
who is a witness
in the cause, are
not competent
evidence.

THE CHANCELLOR. The declarations of a person who is not a party in interest, not a party to the suit, and who is a witness in the cause, are clearly not competent evidence; and that part of the deposition must be suppressed.

The counsel for the plaintiff then moved, that the answer of the plaintiff to the *cross bill*, filed on the part of the defendants, be read, on the ground that the cross suit was to be considered as brought on to a hearing concurrently with this, which, they said, was the usual and proper course; and for this they cited *Wyatt's Pract. Reg.* 218. *Coop. Tr. Ch. Pl.* 87. And they also insisted, that the counsel for the defendants having, yesterday, raised the question, as to the competency of the deposition of *Peter Townsend*, in the cross suit, as evidence in this suit, and taken the opinion of the Chancellor, who decided that the deposition was inadmissible; the motion to the court, for its opinion on that question, implied that both suits were on hearing together.

But the defendants' counsel denied that they had moved to bring on the cross suit to a hearing ; and insisted that, without their motion, it could not be considered as before the court.

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THE CHANCELLOR. It is not material to the decision of the present question, whether the cross suit is to be deemed as regularly brought on to a hearing, or not ; for the plaintiff cannot read his own answer to the bill of discovery, in the cross suit, unless the defendants choose first to produce it in evidence. The plaintiff cannot testify for himself, unless at the instance, and on the call of the defendants ; and it is for the defendants to determine, whether the answer is to be admitted as evidence, in this cause or not. The motion is, therefore, denied.

A plaintiff can not read his own answer to a bill of discovery, in a cross suit, in evidence, unless the defendant chooses first to produce it.

In arguing on *the merits*, the counsel for the plaintiff entered into a minute examination of the evidence, and contended, that the contract, as stated in the bill, was fully proved ; that it had not been rescinded, and had been carried into execution on both sides ; that it was no objection that the defendants had no funds in their hands, as they might be directed to collect the money according to the provisions of the act.

July 9th.

That this case could not be brought within the statute of frauds ; there was no grant, assignment, or surrender, or sale of any interest in lands. It was a mere *easement*. A grant of a right of way is not within the statute ; and if this agreement was within the statute, it was taken out of its operation by the part performance. The entry of the defendants on the ground, and digging the canal, was a part performance.

They cited, 1 Schoale & Lefroy's Rep. 22. 40, 41, 42. 1 Vesey, 221. Sugden's Law of Vendors, 72—85. 3 Atk. 503. Prec. in Ch. 560.

For the defendants, it was insisted, that, if there was a valid contract, the plaintiff had a clear remedy at law, under the statute ; that no contract, as stated by the plaintiff, had been shown ; the contract, in the *alternative*, as alleged by

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There was a great and irreconcilable contradiction in the evidence. The witnesses of the defendants were disinterested. Three of the defendants, in their answers, deny the contract set up by the plaintiff. If a defendant denies a fact charged in the bill, it requires two witnesses to countervail his answer. So, according to the sense and spirit of the rule, if there are two defendants, each denying the same fact, it requires four witnesses to countervail their answers. (*Mortimer v. Orchard*, 2 *Ves.* jun. 243.) The confession of one defendant, binds him only. (*Wyatt*, 23. 188. But see 1 *Dickens*, 24. 12 *Vesey*, 355.) The evidence of *Mason* and his minutes, are conclusive as to the contract.

But, whatever the contract was, it was abandoned in June, 1807; and being *in fieri*, and not completed, or reduced to writing, the defendants had a right to abandon it. (6 *East*, 602.)

Again, the commissioners were bound to pursue the directions of the act, strictly. They had no authority to enter into such a contract. The act never intended, nor contemplated a personal suit or demand. There can be no *personal decree* in this case. A decree under an *illegal* contract will not bind the land, which was ultimately to pay, and this court cannot force an assessment on the land.

Again, the case is within the statute of frauds. (*Rob. on Frauds*, 126. *advertis.* p. 17. 6 *East*, 602.)

The answer peremptorily denies the agreement; and it is not competent to prove the agreement *aliunde*. (6 *Vesey*, 12. 2 *Bro. Ch. Cas.* 559. *Dickens*, 664.) No part performance will be sufficient, unless that part performance was in *pursuance* to the contract, and was such, that the non-fulfilment of the contract would be a fraud. (1 *Bro. Ch. Cas.* 480. *Mitford, Arg.* *Loft*, 808, 809. 7 *Vesey*, 341. 1 *Vesey*, 221. 2 *Bro. Ch. Cas.* 563. 3 *Atk.* 4.

Amb. 586. 2 Bro. Ch. Cas. 561. 566. Arguendo.

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Sugden's Law of Vend. 83, 84. (3d ed.) 1 Schoale & Le-

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Part of the contract was clearly within the statute, even if the agreement as to lowering the dam was not. If a contract is void in part, by the statute, it is void *in toto*. (*Anst. 420. 525. 7 Term Rep. 281. Sugden's Law of Vendors, 64.*)

The cause stood over for decision, on the merits, to this day.

THE CHANCELLOR. The object of this suit is to obtain *August 29th.* a discovery of the funds under the control of the defendants, as commissioners, and to compel them to perform, on their part, the parol contract set forth in the bill. The contract is denied in the answers, and the statute of frauds is also insisted on, and much testimony has been taken on each side, in respect to the contract, and to its part performance.

1. The first question that naturally arises upon the case is, whether the contract, as charged, was a "contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them," within the 4th section of the *English*, or the 11th section of our statute of frauds, (sess. 10. ch. 44.)

The commissioners, under the act stated in the case, (sess. 30. c. 25.,) were authorized "to remove any obstructions, dam, or erection, mill or improvement, in or across the *Wallkill*, at the outlet of the drowned lands, and to use and occupy a sufficient proportion of lands adjoining each bank of the river, on which they might find it necessary to lay the rocks, stone, earth, gravel, or other substance, which they might have any occasion to take out of the same ; and to take, use, occupy, and enjoy the same, for the purposes aforesaid, and to contract with the owner for the damages," &c. Under this authority the contract is alleged to have been made, and possession of the lands of the

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plaintiff taken ; and I think it must be considered as a contract concerning an interest in lands, within the purview of the statute of frauds.

I lay it down preliminarily, as a clear principle, that the commissioners had no legal right to use and enjoy the lands of the plaintiff, or to remove or destroy his property, without a contract with him, and his assent for that purpose, or until compensation had been made or tendered, as the act provided. The latter was not done, and therefore, a valid contract was necessary to give them the right.

The statute, under which the commissioners acted, mentions that they were "to contract," or to treat and agree, "with the owner, for the damages or compensation, and to pay the amount." The nature and form of the contract is not defined in the act, and it must be understood to mean a contract valid by the existing laws of the land. The statute, most certainly, did not intend any unnecessary interference with established principles. The owner must be a person of competent age and ability to contract, and the contract, to be binding, must have the requisite form and substance. It must be subject to the same rules and construction as all other contracts of the same nature. Thus it has been decided, (*Simonds v. Catin*, 2 *Caines*, 61.,) that when a statute authorizes a sale of lands, it means a sale with the customary solemnities, and by deed or note, in writing, according to the direction of the statute of frauds.

It was said that the right granted to the commissioners, by the contract charged, was an easement only, and not within the act. I have looked into the books ; and with respect to a right of entry on land for a temporary and special purpose, and which is sometimes treated as an easement, there are very subtle distinctions, and much apparent contradiction in the cases. Thus, a sale of timber growing, or of potatoes in the ground, and which had done growing, has been held to be a sale not within the statute of frauds. (*Anon. 1 Lord Raym.* 182. *Parker v. Stanilard*, 11 *East*, 362.) But a

sale of grass growing, or of turnips growing, was the sale of an interest within the act. (*Crosby v. Wadsworth*, 6 *East*, 609. *Emmerson v. Heelis*, 2 *Taunton*, 38.) In one case in the K. B., rather imperfectly reported, (*Wood v. Lake, Sayer*, 3.,) it was held, that a parol agreement for liberty to stack coals on land for seven years, was but an easement, and not an interest, and so not within the statute. I mean not to meddle with the above cases, except so far as to observe, upon the last, which has some bearing upon this, that it is justly liable to all the observations against its authority, made by Mr. Sugden, (*Law of Vendors*, 3d *Lond.* ed. 56.,) and that the agreement, thereby stated, seems to have been equally within the words, and within the mischief of the act. The contract, in this case, related to an interest to be acquired in the land itself, and to such a possession, for the limited purpose, as would entitle the commissioners to an action of trespass or ejectment, for any injury or interruption to the possession. They were to have the *use and enjoyment* of the land. Unless the contract reached to an interest in the soil, the objects of the act could not be answered, and would be exposed, at all times, to be defeated. The privilege of erecting a mill dam on the bank of a creek, was held, in the case of *Jackson v. Buel*, (9 *Johns. Rep.* 298.,) to be an interest for which an ejectment would lie, because an interest was given in the soil, not only for erecting the dam, but for possessing it. So, a contract for the sale, and delivery of possession, has been held to carry with it an interest in the land, and to come within the statute. (*Howard v. Easton*, 7 *Johns. Rep.* 205.) With respect to the word tenement, it has been held to reach not only to corporeal inheritances, but to rights annexed to, and to be enjoyed as part of the inheritance; such as rents, tolls, estovers, commons, piscary, &c.; for these all savour of the realty. (*Co. Litt.* 200.) If we resort to either branch of the clause of the statute of frauds, the contract seems to be within it. The use of the outlet of the *Wallkill*, and its

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banks, for the purposes declared, and the enjoyment of that use, by the commissioners and *their successors*, was to be as permanent as the improvements intended. The provision was for a public and lasting object, and if the outlet was not kept clear and unobstructed, the lands to be improved might again be overflowed.

2. But the plaintiff alleges a part performance of the contract, to take the case out of the statute. The answers deny the agreement, and any part performance in pursuance of it. This has led the parties into much parol proof; and unless the plaintiff has clearly established the contract, as charged, and, also, a part performance of the same contract, he has not entitled himself to the relief sought.

The proof of the existence of this contract, as charged in the bill, consists of the depositions of *Moses Phillips*, father of the plaintiff, and one of the original commissioners, of *Moses Phillips*, jun., *Lemuel Judson*, *Henry W. Phillips*, and *John Kinney*, who all prove various confessions of the different commissioners, with whom the plaintiff contracted, of the making of the contract as charged. On the other hand, there are the answers of the defendants, denying any such contract, and the depositions of *John Townsend*, *James Moore*, and *Joseph Jefferson*, proving a different contract, and one conformable to that alleged in the answers, and which was to be reduced to writing. There are, also, on the part of the defendants, the depositions of *William Townsend* and *David Mason*, proving the application of *Moses Phillips*, in behalf of the plaintiff, to *David Mason*, to take minutes of the contract with the plaintiff, and to reduce it to writing, to be executed, by the parties respectively, at the meeting of the commissioners in June, 1807. The minutes so taken by *Mason* are an exhibit in the cause, and they relate to a contract as set forth in the answer, and do not apply to the contract charged in the bill. The testimony, as it respects the quantity of the proof on each side,

may be considered as nearly balanced ; but there are intrinsic circumstances arising out of the nature of the testimony, which inclines the balance in favour of the defendants. The answers of the defendants, who were the original contracting parties, and who were selected by the legislature, for their judgment and character, to execute this public trust as commissioners, who have no personal interest in the question, and who must be presumed to have full knowledge of the contract intended to be made by them, are entitled to, and cannot but receive, very great consideration, in estimating the relative weight and credit of testimony. The original minutes of *Mason*, the attorney, taken down at the time, from the mouth of *Moses Phillips*, the father and agent of the plaintiff, for the express purpose of reducing the contract to writing, and preparing it for execution, ought to have a more preponderating influence than the fallacious memory of witnesses speaking several years afterwards. Written proof, of that kind, always outweighs parol proof, in judgment of law, as well as by its power to produce conviction.

The plaintiff has, accordingly, failed in making out, by clear and satisfactory proof, the existence of the contract as laid.

The evidence on the part of the plaintiff, in support of the allegation of part performance of his contract, as charged in his bill, consists, principally, of the testimony of *John Kinney*, *Gabriel N. Phillips*, *John Ranin*, and *Thomas Waters*, proving that the commissioners entered on the land, and commenced the canal, in the autumn of 1807, and continued working at it in the year ensuing. The defendants admit this fact, and, also, that the plaintiff lowered his dam four feet in *April*, 1808 ; but they say that the entry and occupation of the land was made with the express or implied assent of the plaintiff, and under a mutual understanding that a compensation was to be made, but not the specific compensation now claimed. There is, likewise, proof, that at the meeting, in *June*, the commissioners refused to execute the contract

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set forth in the answers, and, consequently, that no contract was signed ; there are, also, other facts in proof, from which we are necessarily led to infer, that this refusal must have been known at the time to the plaintiff. As the contract, whatever it was, rested in parol, and had not been consummated, nor any act done under it, the commissioners clearly had a right to avail themselves of the *locus penitentiae*, and reject it. It does not follow, then, as a necessary consequence, that the subsequent entry of the commissioners, in the autumn of that year, was in pursuance of the contract charged, nor is it to be reasonably presumed, after that refusal, provided any other good reason can be assigned for that entry. The real motive is obvious, independent of the contract ; it was in pursuance of their public trust, and to carry their powers into effect. The 11th section of the act seems evidently to contemplate an entry and exercise of power, being previous to the settlement of compensation ; and the 4th section is far from being very clear and explicit on that point. Though I consider it to be a fundamental principle of law, and of good government, that private property cannot be taken away for public purposes, without just compensation, and that, until that is made, the party aggrieved would be entitled to his legal remedy ; yet it was very natural that the commissioners should consider the provisions of the act as sufficient for their entry, in the first instance, and that it was safe, or expedient, to leave the question of compensation as a subject of future arrangement with the plaintiff, either by agreement, or by assessment under the act. The grounds upon which the entry was made, as stated by the commissioners in their answer, appear to me to be extremely probable. The entry was, at least, no very decisive and unequivocal evidence of a part performance of the identical contract set up by the plaintiff. It was certainly not such an act done, to use Lord Hardwicke's words, "as could be done with no other view or design than to perform the agreement." It would be extravagant to maintain this, when we consider the

authority and objects of the trust under which the commissioners acted.

It is not sufficient that the entry and use of the land is evidence of *some* agreement. It must be satisfactory evidence of the *particular* agreement charged, or it will not take the case out of the statute.

It is well settled, that if a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, *that* agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed. These principles have been recognised in a series of decisions. (*Lacon v. Mertins*, 3 *Atk.* 4. *Gunter v. Halsey*, *Amb.* 586. *Niven v. Belknap*, 2 *Johns. Rep.* 587. *Frame v. Dawson*, 14 *Ves.* 386. *Clinan v. Cooke*, 1 *Schoale & Lefroy*, 41. *Lindsay v. Lynch*, 2 *Schoale & Lefroy*, 1.) These adjudications will fully justify me, by their strong and pointed application to this case, in denying to the plaintiff the execution of the agreement contained in his bill. He has failed in satisfactory proof of his agreement; he fails, also, in showing such acts of performance as are necessarily to be imputed to that agreement, and cannot reasonably be imputed to any other cause.

This case, like many others, shows the utility of the statute of frauds, and the danger of relaxing the sanction of its provisions. I agree with those wise and learned judges, who have declared that the courts ought to make a stand against any further encroachment upon the statute, and not to go one step beyond the rules and precedents already established.

3. But here arises another and serious question, whether

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the bill ought to be dismissed. It is certain that the plaintiff has sustained injury by the act of the commissioners, and is entitled to compensation ; and the defendants admit, that they entered upon his land and dug the canal, under his express or implied assent, and with a mutual understanding that compensation should be made. How is the plaintiff, then, to obtain compensation ? He cannot, perhaps, for the lowering of his dam, in the mode provided by the 11th section, for it was his own voluntary act, not that of the commissioners ; and he might meet with insuperable difficulties in an action of trespass at law, for entering to cut the canal, as the entry appears to have been with his assent, and seven years have elapsed since it was made. This case, then, presents peculiar and strong claims for the interference of this court, in securing to the plaintiff a due and adequate compensation. In *Clifford v. Brooke*, (13 Ves. 131.,) the bill could not be sustained on the ground of fraud or mistake, and the relief prayed for was in the nature of damages. The Chancellor observed, that if, in dismissing the bill, *he were to exclude the plaintiff from all remedy, he should pause upon the decision* ; but he concluded that the plaintiff might bring an action at law for his damages. I have no doubt of the jurisdiction of this court over this case, and that it can cause the damages to be assessed, either by a reference to a master to inquire into, and report them, or by an issue of *quantum damnificatus*. The case of *Denton v. Stewart*, before Lord Kenyon, when Master of the Rolls, was to this effect. (1 Fonb. 38. n. y., and 165. n. b., and 1 Ves. jun. 329.) That case was, afterwards, approved and followed by Sir William Grant, in *Greenaway v. Adams*, (12 Ves. 395.) In both those cases, which were bills for specific performance, the defendant had put it out of his power to perform the contract, and the court retained the bills, and referred it to a master to assess the plaintiff's damages. This appears to me to be a case under similar circumstances, and as proper as any that can arise for the

application of the principle of those decisions. Justice demands that the plaintiff should have relief, and I am apprehensive he would be remediless without the aid of this court. The cases are numerous in which the court of chancery has caused damages to be assessed, either by an issue or by a master, at its discretion. (2 *Fonb.* 441. *Hedges v. Euerard*, 1 *Eq. Cas. Abr.* 18. pl. 7. *Cudd v. Rutter*, 1 *P. Wms.* 570. *Errington v. Aynesly*, 2 *Bro.* 341.) I believe the more usual course, where the damages are not a matter of mere computation, is, by awarding an issue, and, under the circumstances of this case, I deem it the more advisable method.

I shall, accordingly, retain the bill, and award an issue of *quantum damnificatus*, to assess the damages which the plaintiff has sustained by the entry and acts of the commissioners, and by his own act in lowering his dam, which was a consequence of their directions; that the issue be tried at the *Orange* circuit, and that all further questions be reserved until the return of the *postea* on such issue.

After the damages are assessed, I apprehend no difficulty in finding means to enforce payment. It is made the duty of the commissioners to assess and pay the damages to be sustained. It is part of their trust, and the sum becomes a *lien* on the lands that are to contribute.

The following decree was, thereupon, entered:

"That the plaintiff ought to receive, from the defendants in this suit, or their successors in office, the damages sustained by, and compensation due to, him, by reason of lowering his mill dam across the *Wallkill*, in the bill mentioned, at the time the same was done; and, also, by reason of the defendants, their predecessors, or successors in office, entering upon, using, and occupying the lands of the plaintiff, for digging a canal, and otherwise, as the same may have been used for the purpose of draining, or to facilitate and assist in draining, the drowned lands, in the pleadings mentioned. But, inasmuch as it does not satisfactorily appear to the

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1814. court, that any agreement has been made by and between the parties, as to the amount of such damages and compensation, to the end, that the same may be satisfactorily ascertained, it is further ordered, adjudged, and decreed, that an issue be made up between the parties, to ascertain, by the verdict of a jury of the county of *Orange*, the amount of such damages and compensation ; that the said issue be tried at the next, or any subsequent circuit in the said county ; that, for the purpose of forming a proper issue for the assessment of the damages and compensation, to which the plaintiff is declared to be entitled as aforesaid, the plaintiff shall declare, in *assumpsit*, that the defendants promised to pay him as much as he reasonably deserved to have for his said damages and compensation, or to that effect ; and to which declaration, the plea shall be *non assumpsit* ; on the trial, the plaintiff shall not set up any agreement between him and the defendants, or their predecessors in office, as to the amount of damages and compensation ; and the defendants shall admit their assumption to pay the plaintiff so much as he reasonably deserved to have as damages and compensation, for lowering his mill dam, by the defendants' request, and for their accommodation, as commissioners for draining the drowned lands, and for the defendants, or their predecessors, or successors in office, entering upon, using, and occupying the lands of the plaintiff, as aforesaid ; and the jury are to allow, in their assessment of damages, interest upon the amount of the damages they may find, for such damages and compensation, from the times when the several acts were done, for which the plaintiff is declared to be entitled to damages and compensation as aforesaid, to the time of rendering the verdict ; and that all further directions be reserved until the said issue shall be tried, and the *postea* returned to this court."

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S. being about to sail on a voyage to the *West-Indies*, where he afterwards died, addressed a letter to M., containing the following clause : "A thousand accidents may occur to me, which might deprive my sisters of that protection which it would be my study to afford ; and, in that event, I must beg that you will attend to putting them in possession of two thirds of what I may be worth, appropriating one third to Miss C., and her child, in any manner that may appear most proper." This was held to be a valid will, especially after it had been proved as the last will of S., by the surrogate, and administration granted with the will annexed ; and that C., and her son, were each entitled to a moiety of one third of the personal estate of the testator, in the hands of the administrator.

Courts, in this state, do not take notice of letters testamentary, or letters of administration, granted abroad, or out of the state. Nor can a person appointed a *guardian* to an infant, in another state, be entitled to receive from the administrator, here, the legacy or portion of the infant.

The guardian must be appointed here, and give competent security, to be approved of by this court, before the payment of the infant's money will be ordered.

On a bill, by a legatee, where the defendant submitted to, and asked the direction of the court, his *costs* were ordered to be paid out of the fund.

**WILLIAM I. SWAN**, of *Charleston, S. C.*, being about to sail, as supercargo, on a voyage to the *West-Indies*, wrote a letter, dated *New-York, August 31, 1810*, addressed to *John Magrath*, which, among other things, contained the following clause : "My dear friend, a thousand accidents may occur to me, which might deprive my sisters of that protection which it would be my study to afford ; and, in that event, I must beg that you will attend to putting them in possession of two thirds of what I may be worth, appropriating the remaining part to Miss C\*\*\*\*, and her child, in any manner that may appear most proper." *Swan* arrived at the *Havana*, and was there taken sick, and died, in the autumn of 1810, unmarried, and without lawful issue, leaving personal property to the value of about 8,000 dollars, over and above all debts, &c. ; part of which had been collect-

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ed, and had come into the hands of the defendant, a citizen of *New-York*.

*Magrath*, to whom the testamentary letter was addressed, declined the executorship, and refused to take out administration on the estate of *Swan*. In consequence of which, the defendant, on producing the letter of *Swan* to the surrogate of the city and county of *New-York*, before whom it was fully proved as the last will of *Swan*, on the 21st of June, 1813, letters of administration, with the will annexed, were granted to the defendant, of the personal estate of *Swan*, in this state.

Miss *C.* having afterwards intermarried with *Morrell*, and residing in *Philadelphia*, with her son, *William*, she, with her husband, and her infant son, by *S.*, as his next friend, filed their bill, in this court, against the defendant. The bill further stated, that the sum of 1,634 dollars and 38 cents, part of the personal property of *W. I. Swan*, deceased, had come to the hands of the defendant, as administrator; that *Barbara Morrell*, one of the plaintiffs, had been appointed by the *Orphan's Court of Philadelphia*, guardian to her said infant son.

That she and her son were each entitled to receive their moiety of the one third of the money in the hands of the defendant, on giving security, by bond, or otherwise, to the administrator, as required by the laws of this state; that they had offered such security to the defendant; but the defendant objected, that he was advised that the appointment of Mrs. *M.*, by the *Orphan's Court of Philadelphia*, as guardian to her infant son, was of no force or validity in this state, and that he could not, therefore, safely pay over the infant's share to his mother, or any other person, without the special order and direction of the court; that the plaintiffs, if the court thought it necessary, were willing to become guardians to the infant, according to the rules of this court, and prayed to be appointed guardians, on giving the requisite security; that the defendant had, also,

objected to paying any definite proportions of the property to Mrs. *M.*, or her son, because the share of each, by the said will, was indefinite ; and that although *Magrath* had a discretionary power to allot their separate proportions, the defendant, as administrator, had no such discretion.

The defendant, in his answer, admitted the facts stated in the bill, and submitted himself to the order and direction of the court.

The cause was submitted, by consent, to the court, on the bill and answer.

*Metcalf*, for the plaintiffs.

*Emmet*, for the defendant.

**THE CHANCELLOR.** This is an amicable suit, by the plaintiffs, as legatees, in and by the last will of *William I. Swan*, deceased, against the defendant, as administrator with the will annexed, and the case is submitted upon bill and answer.

1. The first point is as to the right of the plaintiffs (the mother and son) to the legacy, and the extent of that right. The will was in the form of a letter, addressed to *John Magrath*, at the time when the testator was setting out on a voyage from *New-York* to the *West-Indies*, where he died ; and it contained the following clause : "A thousand accidents may occur to me, which might deprive my sisters of that protection which it would be my study to afford ; and, in that event, I must beg that you will attend to putting them in possession of two thirds of what I may be worth, appropriating the remaining third to Miss C\*\*\*\*\*\*, and her child, in any manner that may appear most proper." It is admitted that the two plaintiffs, *Barbara* and *William*, are the mother and child alluded to in the will. There is no doubt that the paper must be received and treated as a will, and that the plaintiffs are each entitled to an undivided

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moiety of one third of all the estate of the testator. This, indeed, seems to be a point conceded by the case; and the probate of the paper as a will, by the surrogate of New-York, is conclusive; it being the judicial act of a competent court. (3 *Term Rep.* 125. 1 *Vosey*, 287. 2 *Aik.* 324.)

2. Admitting the right, the next point is, whether the plaintiff, *Barbara*, has entitled herself to the portion of her infant son, as she has not been appointed guardian, nor given security, under the authority of this state, but applies as guardian appointed by the *Orphan's Court of Philadelphia*. It is well settled, that we cannot take notice of letters testamentary, or of administration, granted abroad, and that they give no authority to sue here. This is not only the law in *England*, but it has been very generally adopted in this country. (*Tourton v. Flower*, 3 *P. Wms.* 369. *Lee v. Bank of England*, 8 *Ves.* 44. *Goodwin v. Jones*, 3 *Tyng's Rep.* 514. *Riley v. Riley*, 3 *Day's Rep.* 74. *Fenwick v. Administrators of Sears*, 1 *Cranch*, 259.) This case is within the reason of that rule; and the security taken in the *Orphan's Court of Philadelphia* may not be adequate to reach the property lying within this state. This court must judge, itself, of the security, before it directs the payment of the infant's money. The defendant would not be justified in paying the infant's money to the plaintiff, on the ground that she was the mother of the legatee. I had occasion, lately, to consider this point, in the case of *Genet v. Tallmadge*.\*

\* *Anst.*, p. 3. *Tallmadge*.\* It is only in her character of guardian, duly appointed here, upon requisite security, that she can entitle herself to receive the legacy of her son.

My opinion, accordingly, is, that she is entitled, in her own right, to a moiety of the *third* of the testator's estate, and that the defendant, after deducting his taxable costs of this suit out of the one third of the sum of 1,614 dollars and 38 cents, admitted to have been received by him, be decreed to pay a moiety of the residue thereof to the plaintiff, *Barbara*. As the defendant is not in default, and has only

sought the direction of this court in a case proper for it, he ought to receive costs out of the fund; (a) and this is the course of the court in such cases. (*Whopham v. Wingfield*, 4 *Ves.* 630.) As to the remaining moiety of the third, belonging to the child, that must be paid into court, to the register, or assistant register, to abide the order of the court; and when the plaintiff, *Barbara*, is appointed guardian here, and gives the competent security, the money will be paid over to her.

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Decree accordingly.

(a) *Vide ante*, 45., *Tablet v. Tablet*.



**FRANKLIN AND OTHERS against W. I. AND S. ROBINSON.** *August 29th.*

The plaintiff and defendant were joint owners of a ship and cargo, on a voyage from *New-York* to *Batavia*, and back; and the defendant agreed to go out in the ship as *supercargo*, and the plaintiff agreed to pay him, as a compensation for the performance of the duties of a supercargo, the sum of 10,000 dollars, "out of the proceeds of any cargo the ship may bring from *Batavia*, or to deliver him part of such cargo, to that amount, at the current market price, on its arrival at *New-York*, at his option." The ship, on her return voyage, from necessity, put into *St. Kitts*, where the vessel was condemned as unseaworthy, and sold with the cargo, and the proceeds remitted, by the supercargo, to *New-York*.

The defendant having caused 8,000 dollars of the sum stipulated to be paid to him by the agreement, to be insured, as his *commissions*, he recovered the amount, in a suit at law, of the underwriters, as for a total loss, on the ground that he had no remedy on the agreement against the plaintiff, his compensation being payable only out of a particular fund, which depended on a contingency that had never happened. On a bill filed against the defendant for an account, the defendant claimed to retain a certain sum for commissions and for services, in the sale and management of the concern; and it was held, that the defendant was not entitled to any allowance, on a *quantum meruit* for his services, merely on the ground that the contingency had never happened on which his specific compensation, for the same service, was to depend; nor was he entitled to any compensation for his services at *St. Kitts*, as he still acted in character of supercargo, and the sales there were substi-

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tuted for a sale in *New-York*, on which, by his special agreement, he was to receive no commission. Joint owners, or partners, are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose.

THE plaintiffs were joint owners, with the defendants, of the ship *Mary*, and her cargo, on a voyage from *New-York* to *Batavia*, and back. *W. I. Robinson*, one of the defendants, who were partners in trade, engaged to go out in the ship as *supercargo*, and an agreement was, thereupon, made and executed between the parties interested, as follows : "We, the subscribers, owners of the ship *Mary*, having engaged *William I. Robinson*, as supercargo, on her intended voyage from here to *Batavia*, and possibly to *Canton*, have agreed, in consideration of his undertaking and executing the duties of his trust, to pay him 10,000 dollars, out of the proceeds of any cargo the ship may bring from *Batavia*, or to deliver him part of such cargo, to that amount, at the current market price, on arrival here, at his option. But if the ship should proceed to *Canton*, and the letter of credit, with which he will be furnished, should be availing, we, in that case, agree to pay him 12,500 dollars, as above, otherwise, he is to receive no more than 10,000 dollars, the same as if the voyage out had terminated at *Batavia*. *New-York*, 21st of *March*, 1798." Signed by the owners, and by the defendants. On this agreement were the following endorsements. "I agree to undertake the management of the business committed to my care, as within, on the terms specified. *W. I. Robinson*."

"We agree, in consideration of the sum to be paid *William I. Robinson*, as herein specified, to take upon ourselves the trouble of the management and sale of the return cargo from *Batavia* or *Canton*, free of commission, subject to the direction of a majority of the owners of the ship *Mary*. *Wm. & S. Robinson*."

Before proceeding on the voyage, *William I. Robinson* procured insurance, to the amount of 8,000 dollars, on the com-

missions stipulated to be paid to him by the above agreement ; and, afterwards, recovered the amount of the sum so insured against the insurers.

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He proceeded on the voyage described, and arrived at *Batavia*, where a return cargo was purchased, with which the vessel set sail for *New-York* ; and during her voyage back, was compelled, by stress of weather, to put into *St. Kitts*, where, on a survey, the ship was found unseaworthy, and condemned ; and the laws of the island prohibiting the reshipment of the cargo in another vessel, it was sold there, under the direction of *William I. Robinson*, by merchants, who were paid a regular commission on the sale, and he received and remitted part of the proceeds to the defendants, who, afterwards, received other parts of the proceeds. The vessel was also sold at *St. Kitts*, and purchased in by *William I. Robinson*, for the account of the owners ; and she was, afterwards, repaired, and brought to *New-York*, and there sold, and the money received by the defendants. The plaintiffs demanded of the defendants an account of the proceeds of the vessel and cargo, and a payment of the respective proportions to which they were entitled ; but the defendants have refused to account and pay to the plaintiffs the proportions demanded, alleging their right to retain the sum of 10,000 dollars, the compensation agreed to be paid to *William I. Robinson*, according to the contract above mentioned.

The plaintiffs insisted, that this compensation was to be paid only on the event of the arrival of the vessel with the return cargo from *Batavia* to *New-York* ; and that event having never happened, *William I. Robinson* was not entitled to that, nor any other sum ; and, moreover, that he had recovered for a total loss, on the policy of insurance on the commissions specified in the contract. The bill prayed for an account ; and the payment of the proportions of the vessel and cargo, to which the plaintiffs were entitled ; and for relief.

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The defendants, in their *answer*, admitted that the cargo was sold by merchants at *St. Kitts*, under the directions, and with the assistance of *William I. Robinson*; but they denied that the usual and customary commissions on such occasions were allowed or paid to the merchants.

The defendants alleged, that *William I. Robinson* advised the plaintiffs, by letter, of the situation of the vessel and cargo at *St. Kitts*, and staid there, for the purpose of effecting a sale of the property, collecting and securing the proceeds, and acting for the interests of the concerned, as circumstances might require. That the vessel was sold for 4,700 dollars, and purchased by *William I. Robinson*, for the benefit of the owners, and he charged on that sum the ordinary commission of 5 per cent. That it being impracticable to sell the cargo, without taking bills of exchange on *London*, he employed factors, who guaranteed the payment of the bills for 2 1-2 per cent. That the usual commission at *St. Kitts*, was 5 per cent. on sales, and 7 1-2 per cent. with a guaranty of the debts. And the defendants claim the 5 per cent., for the agency of *William I. Robinson*, in the sale of the cargo.

The proceeds of the sales of cargo, amounted to 164,447 dollars, of which 28,112 dollars was invested in rum, sugar, and molasses, and sent to *New-York*; and the residue, in bills, remitted to *London*; on which the defendants claimed a commission of 2 1-2 per cent.

The defendants admit, that they sold the vessel at auction, and passed the net proceeds, deducting 2 1-2 per cent. commission, to the credit of the concern. They also charge one half per cent. commission, for effecting insurance of the cargo shipped from *St. Kitts* to *New-York*, and 2 1-2 per cent. on amount of duties paid by them.

The defendants further alleged, that a large proportion of the bills of exchange, so remitted to *London*, were protested for non-acceptance and non-payment; in consequence of which it became necessary for them to open a correspond-

ence with merchants at *St. Kitts* and *London*, in order to obtain payment of the bills; that in some instances, the bills were paid with damages, and in other cases, new bills were taken, which were again protested; that the defendants have collected 120,000 dollars of the bills, and 5,843 dollars still remain unpaid; and they have been, for eight years past, diligently engaged in effecting the payment of the said bills, maintaining a correspondence, by letters, with merchants and others, in *Europe* and the *West Indies*, for that purpose, &c.; and as a compensation for their services, they charge the concern, 4,000 dollars, or at the rate of 500 dollars per annum, for eight years: that they have rendered an account of the proceeds of the vessel and cargo to the plaintiffs, and have paid over to the plaintiffs their just and full proportions of all moneys which have come to their hands from the sale of the ship and cargo, reserving only, as security and indemnification of the payment of their claims against the concern, for the services rendered by them, in and about the management of their business, as above mentioned, the sum of 10,000 dollars, which they hold, and insist that they are entitled to hold until they are paid for their services as so claimed.

The cause being at issue, on a general replication, was brought to a hearing before his honour the late Chancellor, who, in October last, pronounced the following decree: "That the charge made by the defendants for compensation, or allowance, by way of salary, as the representatives and agents of the concern in the ship *Mary*, in the pleadings mentioned, for maintaining and conducting the correspondence mentioned in the answer, and, also, all allowance for commissions on the purchase and sale, by them, or either of them, of all, or any part of the goods and merchandise mentioned in the answer, as, also, on the sale of the ship *Mary*, mentioned in the pleadings, except as herein afterwards is directed, be wholly disallowed by the master in taking the account hereinafter directed; and it is further

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ordered, adjudged, and decreed, that it be referred to one of the masters of this court, to take and state an account between the plaintiffs, respectively, and the defendants ; in which account the defendants shall be charged with all moneys received by the defendants, or either of them, as the agents or agent, factors or factor, or as part owners of the ship *Mary*, and her cargoes, mentioned in the pleadings, as well what they, or either of them, received on the sale of the ship *Mary*, as, also, what they, or either of them, may have received on account of the cargo of the ship on her return voyage from *Batavia*, and which have not been accounted for with the plaintiffs. And it is further ordered and decreed, that in taking the accounts, the defendants be allowed reasonable commissions for the sale and disposition of the return cargo of the ship *Mary*, at *St. Christophers*, as mentioned in the pleadings in this cause, the amount of which commissions, so to be allowed to the defendants by the master in taking the account, is to be ascertained by him in manner following, that is to say, by ascertaining what, according to the usage and custom of merchants in such cases, or otherwise, was earned by, or ought to be allowed unto the defendant, *William I. Robinson*, for his services as supercargo of the ship *Mary*, on her outward voyage from *New-York* to *Batavia*, and for disposing of the outward cargo of the ship *Mary*, at *Batavia*, and for procuring, and causing to be laden on board of the ship *Mary*, at *Batavia*, the return cargo, which was brought in her to, and sold or disposed of at *St. Christophers*, as in the pleadings and proofs mentioned, at the time the services were performed, as if no other services had been performed by him. And by ascertaining what, according to the custom of merchants, or the usages established at *St. Christophers* in such cases, or otherwise, was earned by, or ought to be allowed to the defendant, *William I. Robinson*, as commissions for his services as a factor or commission merchant, for selling the return cargo of the ship *Mary*, at *St. Christophers*, as in the pleadings

and proofs mentioned, at the time the services were performed, exclusive of guarantying the payment of the money on such sale. And, then, by crediting the defendants with such portion of the sum of 10,000 dollars as the services at *St. Christophers*, calculated as aforesaid, shall bear to the amount or value of the services rendered by the defendant, *William I. Robinson*, as supercargo of the ship in the voyage, before her arrival at *St. Christophers*, calculated as aforesaid. And that all other just allowances be made to the defendants, on taking the account, for actual disbursements for account of the plaintiffs (if any) in transacting the business at *St. Christophers* as aforesaid, or afterwards. That the master be authorized to examine the parties, or any of them, under oath, in taking the accounts, as he shall see fit and proper; and that the master may report specially, as to any of the matters which may be brought before him, on taking the accounts hereby ordered, if required by either party, and he shall think it reasonable so to do; and that all further directions be reserved until the coming in of the master's report."

On the application of the plaintiffs, a rehearing was directed by the present Chancellor.

On the rehearing, the cause was argued by *Riggs* and *Boyd*, for the plaintiffs, and *Harrison* and *T. L. Ogden*, for the defendants.

**THE CHANCELLOR.** It appears, by the contract between the parties, of the 21st of *February*, 1798, that 10,000 dollars were stipulated to be paid to the defendant, *W. I. Robinson*, in lieu of all compensation and commission, for his services as supercargo upon the voyage, and for the services of him, and his partner, *Sylvester Robinson*, for the management and sale of the return cargo. It further appears, that the defendant, *W. I. Robinson*, caused 8,000 dollars of this sum to be insured, and that, upon the loss of the voyage, he sued the underwriters, and recovered. His right of recovery depend-

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ed on the question, whether he was entitled to demand of the plaintiffs the sum stipulated by the contract; and it was decided, in the first instance, by the supreme court, and finally, on error, by the court in the last resort, (*2 Caines' Rep.* 357. *1 Johns. Rep.* 616.,) that he had no remedy upon the contract with the plaintiffs, because the money was made payable out of a specified fund, and that fund depended on a contingency which had never happened. We are, then, to consider it as the settled law of this case, that the defendants cannot set up a claim under the contract; and the point then is, whether they are entitled to a *quantum meruit* for their services, or for any part thereof, precisely as if no agreement had ever been made.

It is evident, from the variation in the accounts, rendered by the defendant, *W. I. Robinson*, that he rested his demand for compensation, for his services at *St. Kitts*, entirely upon his contract. In his first account, (exhibit No. 5,) he charges the plaintiffs with the 10,000 dollars. This was prior to his recovery against the insurers, and when his claim against them was resisted, on the ground that he had not lost his claim under the contract. Afterwards, in his account, (exhibit No. 6,) and which was exhibited after the recovery against the underwriters, he omits this charge altogether; and this fact is of great force to show the defendant's own sense of the foundation of his claim. But without considering this waiver as absolutely binding, I cannot find any just principle upon which the claim for commissions, set up by the defendants, can be admitted.

It seems to be inconsistent with the object and intention of the parties, in making the contract, to allow the defendants to recover on a *quantum meruit*, merely because the contingency had not occurred on which the extraordinary and specific allowance for the same services was made to depend. This would be giving the defendants an undue advantage, not consistent with equality and justice between the parties. The benefit of the contingency may have

been an inducement for the allowance. The parties to the contract were joint owners of the ship and cargo; and the defendant, *W. I. Robinson*, in his character of *part owner*, was not entitled to charge for his services, except upon the ground of the special agreement. I know of no case which entitles one partner to such an allowance against another, without an agreement. The case of *Thornton v. Proctor*, (1 *Anst.* 94.,) evidently proceeds upon this principle. Each joint owner, in taking care of the joint property, is taking care of his own interest, and the law never undertakes to measure and settle, between partners, their various and unequal services bestowed on the joint business. This must be left to be regulated by contract. But the defendant, *W. I. Robinson*, bestowed his services as *super-cargo*, in which trust and character he had been placed by the whole concern, and, in that character, he can look only to the agreement. His duty, as supercargo, continued at *St. Kitts*, and until the cargo, entrusted to his charge, or the proceeds of it, had arrived at *New-York*; and for the purpose of compensation, the sales at *St. Kitts* may be considered as substituted for the sales at *New-York*, and they were to be made free of commission.

This case must, therefore, be referred to a master, to take and state an account between the parties, under the directions contained in the decretal order of the 14th of October last, except that, in addition to the claims of the defendants, or either of them, disallowed by that order, the claim for commissions on the sale and disposition of the return cargo of the ship *Mary*, at *St. Christophers*, be also disallowed; and that all further directions be reserved until the coming in of the master's report.

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Decree accordingly.

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**TRUSTEES OF HUNTINGTON.** *Nicoll, an infant, by his guardians, &c. against THE TRUSTEES, &c. of the Town of Huntington.*

*June 22-27th,  
and August  
29th.*

The peculiar state of property, and the oppressive nature of the litigation at law, as to the title, affords a proper ground for the equitable jurisdiction of this court. And the party may either come into equity, first to have his title tried at law, under its superintendance, or he may have the title established at law, before he comes to this court; and where the title is once established to the satisfaction of the court, either upon its own view of the testimony, or by verdict on one or more issues, awarded at its discretion, it will declare in whom the right exists, by a decree, and protect that right by a perpetual injunction. But if the plaintiff, from his own case, does not show enough, or fails to make out a title, by evidence, his bill will be dismissed without awarding an issue.

The patent to *William Nicoll*, of the 4th of June, 1688, of certain islands on the south side of *Long Island*, does not extend to *Captree Island*, *Oak Island*, and *Grass Island*.

Costs, in equity, do not always follow the event of the cause; but are awarded or not, according to the justice of the case, in the sound discretion of the court. And where a plaintiff had probable cause for seeking the aid of the court, but failed in establishing his title; but the defendant showed none or no better title to the property in dispute, the bill was dismissed without costs on either side.

THE bill, which was filed in May, 1806; stated that letters patent were granted, on the 4th of June, 1688, to *William Nicoll*, the ancestor of the plaintiff, "for all those islands, and small isles of sandy land and marshes, or meadow ground, with the appurtenances, situate, lying, and being on the south side of *Long Island*, between the *Inlet*, or *Gut*, commonly called *Huntington Gut*, and the lands of the said *Nicoll*, at a certain river called *Conetquint*, in the bay, or sound, that is, between the firm land of *Long Island* and the beach, together with all and singular, the lands, meadows, marshes, moors, waterponds, hawking, hunting, fishing, and fowling, and all the rights, profits, hereditaments, and appurtenances, to the said islands, isles, and premises belonging, or in any wise thereto appertaining."

That the islands, so granted, are known by the names of *Fire Island*, *Captree Island*, *Oak Island*, and *Grass Island*, the three last of which are the subject of controversy in the cause. The patentee took possession of the islands, and transmitted them, by descent, to the great grandfather of the plaintiff, who was seised thereof in 1745. In *August*, 1778, he made his will, and devised the islands to *William Nicoll*, the grandfather of the plaintiff, for life; remainder to the father of the plaintiff, for life; remainder to the first son of the plaintiff's father, in fee tail; and, afterwards, died. The plaintiff's grandfather entered on the premises, under the will, in 1780, and continued in possession until his death, in 1796. The plaintiff's father then entered as tenant for life, and continued in possession until his death, in 1799, when the plaintiff, then *en ventre sa mere*, became seised of the premises in ~~fee~~ tail, and which was converted into a fee simple, under the will, by virtue of the act abolishing entails. (See *Stedfast v. Nicoll*, 3 Johns. Cas. 18.)

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That the premises in question, from the remotest period, until about twenty or thirty years ago, were merely resorted to for fishing and fowling, with or without the permission of the owners; that they are incapable of being inhabited or enclosed, being at a considerable distance from the main land of *Long Island*; that they produce large quantities of grass and herbage, and have lately become valuable; that, for forty years, and upwards, the ancestors of the plaintiff used the islands, as owners thereof, by leasing the same, and giving permission to persons to cut the grass; that the lands of the plaintiff, at *Conetquont river*, (between which, and the gut called *Huntington Gut*, the islands, granted in the patent, lie,) are situated eastward of *Fire Island*, which is the easternmost of the four islands; that *Huntington Gut* was a water passage through the beach, from the bay to the ocean, west of the westernmost of the four islands; that the guts through the beach to the ocean are fluctuating and changeable, sometimes filling up, and new ones opening, al-

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ways further to the westward ; and those that remain, gradually work to the westward, so that it is now difficult to ascertain where the gut, called *Huntington Gut*, in the patent, was, in early times, situated ; and that the gut, so called *Huntington*, does not now exist, at least, at the place where it was when the patent issued.

That, on the 30th of *November*, 1666, letters patent issued, granting and confirming unto the freeholders and inhabitants of the town of *Huntington*, their heirs and successors, " all the lands which had already been, or thereafter should be, purchased for, and on behalf of the said town, whether from the native proprietors, or others, within the limits and bounds therein expressed," to wit, " from a certain river or creek, on the west, called by the *Indians*, *Nakaquatick*, and by the *English*, the *Cold Spring*, to stretch eastward to the *Nasiquack* river ; on the north to be bounded by the *Sound*, and on the south, by the sea, including there, nine several necks of meadow ground," &c.

That these nine necks of meadow ground form part of the shore of *Long Island*, on the north side of the bay, in which the said islands are situate ; and counting from the eastern boundary line of the town of *Oysterbay*, which is the western line of *Huntington*, the nine necks of meadow ground will not extend so far eastward as the most westerly of all the four islands.

On the 2d of *August*, 1688, letters patent were issued, confirming unto the freeholders and inhabitants of *Huntington*, the lands mentioned in the last patent above stated, and constituting the grantees a corporation, &c. ; and saving to the king all necks of land not purchased of the *Indians*.

That, on the 5th of *October*, 1694, the inhabitants of *Huntington* applied to the governor of the province of *New York*, for a grant and confirmation of the premises mentioned in the first patent, so far only as that the limits and bounds of their town should not be as above mentioned, but as hereafter expressed, viz. " all those tracts and necks of land

lying upon *Long Island*, within the county of *Suffolk*, bounded on the west by a river called *Cold Spring*, and a line running south, from the head of *Cold Spring*, to the south sea; on the north, by the sound; and on the east, by a line running from the west side of *Fresh Pond*, to the west side of *Whitman's Dale*; from thence to a river on the south side of the island, on the east side of a neck called *Sampawwams*, and from the said river south to the south sea." Letters patent of grant and confirmation, were accordingly issued, and the freeholders and inhabitants of the town incorporated within those limits.

That the eastern boundary line of the town of *Huntington*, as described in the last-mentioned letters patent, is not so far eastward as the most westerly of the said islands; and that the boundaries of *Huntington* have ever since been according to the bounds described in the said patent.

That, until within twenty or thirty years last past, those islands were regarded of little value, and the owners did not take much pains to obtain the products of them exclusively; that, consequently, some of the inhabitants of *Huntington* cut, and carried away, grass from them; but when, in later years, the products became more an object of attention, the ancestors of the plaintiff asserted their right, and brought actions of trespass against persons acting under the town of *Huntington*, for entering, cutting, and carrying away the grass, which suits were brought before justices of the peace, and uniformly determined in favour of the plaintiff's ancestors; and the defendants in those suits never pleaded any title. But, lately, the defendants have set up their title to those islands, as part of the common lands of *Huntington*.

That, in 1802, *Zebulon Smith* having entered on *Captree* island, and cut and carried away grass, in defiance of the plaintiff's right, and *J. Jarvis*, and *T. Smith*, having, also, done the same, actions of trespass were brought against them by the guardians of the plaintiffs, before a justice of the peace, and they all pleaded titles under the town of *Hunting-*

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ton; and the causes were, afterwards, removed to the supreme court, and the defendants respectively pleaded that the *locus in quo* was the freehold of the trustees of the freeholders and commonalty of the town of *Huntington*. The plaintiff replied the freehold in himself, and the possession thereof by his guardians, and *traversed* the title set up by the defendants, on which issue was joined, and one of the causes tried at the *Suffolk* circuit, in 1805, and a verdict found for the plaintiff; the other two causes were not tried for want of time.

That *Jesse Weeks*, pretending title to the islands in question, under the town of *Huntington*, brought actions of trespass against *Peter Monfort* and *Elias Leek*, who entered thereon, under the plaintiff, which actions were still pending. That the defendants persisting in their claim to the said islands, declaring their intention to enter thereon, and to encourage others to enter, and cut, and carry away, the grass, &c., in despite of the plaintiff's title, so that the plaintiff will be forced to abandon his rights, or be led into a *multiplicity of suits, and to great expense*.

That owing to the great changes which have taken place in the beach, between the bay and the ocean, and the guts or water passages through the same, since the letters patent were issued, the *Huntington* gut cannot be located without the testimony of *aged witnesses*. And the bill, therefore, prayed that their testimony might be *perpetuated*; and that the title of the plaintiff might be established by a decree of this court; and that the defendants may be restrained by an injunction from further entering on the islands, and taking the profits; and that the suits against *Monfort* and *Leek*, also, be enjoined; and for further and other reliefs, &c.

The *answer* of the defendants admitted the patent to *Nicoll*, in 1688, but insisted that it covered *Fire Island* only, and not the others. They denied that any of the ancestors, or guardians of the plaintiff, ever had seisin or possession of, or right to, the other islands, but admitted the chain of descent,

as stated, and the title to *Fire Island*; that the four islands are uninhabitable, and were only useful for the grass, &c.; and denied any use by the plaintiff, or his ancestors, or ownership, except as to *Fire Island*. The defendants denied that *Huntington Gut*, mentioned in the patent to *Nicoll*, lay west of the four islands, and averred that it was the same as the one now called *Fire Island Inlet*, and, sometimes, formerly, the *Great Gut*; and was, from the earliest settlement of the country, known by the name of the *Huntington Gut*. They admitted the changes of the guts, as stated by the plaintiff; that *Huntington Gut*, in the patent, is now called *Fire-Island Inlet*, and was never filled up, and that no other gut was ever called by the name of *Huntington*.

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They admit the patent and confirmation to the town of *Huntington*, in 1666, and that, counting east, the nine necks will not include either of the four islands; but they insisted that the nine necks were not contiguous, but were so many necks as had been purchased of the *Indians*, and that some of them were as far east as the bounds of *Huntington*; that the three islands are embraced by the patent of *Huntington*; and that the freeholders, &c., took possession of them as such, and continued in possession, until the patent of the 2d of *August*, 1688. They admitted the patent of confirmation in 1694, and that the bounds of the town are as therein described; and that the eastern boundary line of the town, as set forth in the patent, is not so far east as to embrace the three islands, or either of them. The defendants insisted, that the inhabitants of *Huntington* have always claimed and exercised ownership, and, for twenty years past, have let out the lands yearly; and that no adverse claim was set up, until about eighteen or twenty years ago, when the plaintiff's grandfather made claim to those islands; and about twelve years ago, he brought actions of trespass against persons entering on the islands under the defendants, before justices of the peace; and the defendants pleading title, the causes were removed into the county court, but were not prosecuted fur-

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ther. That the guardians of the plaintiff brought three actions of trespass, as stated by the plaintiff, but the defendants in those suits did not plead, or rely on the title of the town of *Huntington*, but on the want of possession in the plaintiff; and that the defendants insisted on their right, and a possession of the three islands, for above one hundred years. They admitted, that suits were brought against *Smith* and others, and a verdict found in one of the suits, for the plaintiff; but that such verdict was against the evidence, which was contradictory. They admitted that they persisted in their right, but denied any intention to force the plaintiff to abandon his claim, by a multiplicity of suits; and they objected to the examination of witnesses *in perpetuam rei memoriam*, and to the prayer of the bill.

It is unnecessary to state the mass of evidence taken in the cause. The material parts of it will be found in the opinion delivered by the court.

In 1807, the Chancellor having ordered an injunction to restrain *Weeks* from proceeding in the suits brought by him; and, also, that the guardians of the plaintiff should be examined as witnesses in the cause, *appeals* were entered on those orders; and, in *Februdry*, 1808, the court of errors dismissed the appeal, and remanded the cause. (Vide S. C., 3 *Johns. Rep.* 566—608.)

This cause was first brought to a hearing, on the pleadings and proofs, before the late CHANCELLOR, in 1809, who, without entering fully into the merits, awarded a feigned issue, to be tried in *Queen's* county, by a special jury, at the circuit of the supreme court. By the directions for the feigned issue, the right of *Nicoll* only, to the islands in question, was to be tried, without any inquiry into the title of the town of *Huntington*.

The feigned issue was accordingly made up, and tried before the present *Chief Justice*, in *June*, 1811, and a verdict was found against the plaintiff's title. The judge certified, that he was satisfied with the verdict; and that he

was of opinion, and so declared to the jury, on the trial, that neither the plaintiff, nor the trustees of the town of *Huntington*, had any title to the premises in question, upon a just location of their respective patents.

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In *August*, 1811, the plaintiff petitioned for a rehearing, and, also, moved for a new trial of the feigned issue, which last motion stood over, by order of the court, until the question as to a rehearing should be decided ; because, if a rehearing should be granted, a new trial would be unnecessary.

The petition for a rehearing stated, as grounds for the application, that the Chancellor had erroneously excluded some affidavits which had been offered in evidence on the part of the plaintiff; and that the feigned issue, as directed, had only brought the plaintiff's title in question, without, at the same time, inquiring into the title of the defendants.

In *December*, 1811, the Chancellor ordered a rehearing of the cause.

In *May*, 1812, a petition was presented, on the part of the plaintiff, to dismiss *William Udall*, as one of the guardians of the plaintiff, to the end that he might be a competent witness for the plaintiff in the cause, the plaintiff offering to give security for costs, if required ; and the guardian was, accordingly, dismissed.

In *October*, 1812, the plaintiff petitioned the court for an order for leave to examine further witnesses in the cause, to establish facts discovered since the former hearing, and to examine *William Udall*, late one of the plaintiff's guardians, and who could not, while guardian, have been examined ; and in support of this application, the following cases were cited : *Callon v. Mince*, *Prec. in Chan.* 234. 2 *Vern.* 472. *Sanford v. Paul*, 3 *Bro. C. C.* 370. 2 *Dickens' Rep.* 750. *Cursus Cancellarie*, 281. *Mayor, &c. of London v. Dorset*, 1 *Ch. Cas.* 228. In *January*, 1813, the late Chancellor granted the prayer of the peti-

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The cause was finally brought to a hearing on its merits, before the present Chancellor, the 22d of June last; and was argued by *Harrison* and *Riggs* for the plaintiff; and by *T. A. Emmet* and *Wells*, for the defendants.

*For the plaintiff*, it was contended, 1. That the plaintiff had a right to the equitable interposition of this court on account of the *difficulties* attending a remedy at law; that a court of chancery has jurisdiction, and it may decide questions of law and fact, without a jury, and though such questions relate to lands or goods. (5 Br. P. C. 389. 8 Br. P. C. 399. 5 Vesey, jun. 671. Cur. Cancell. 344. 6 Cranch's Rep. 22. 1 Johns. Cas. 436. 3 P. Wms. 294. 2 Vesey, 552. 1 Vern. 287. 292. 1 Ch. Cas. 155. 1 Schoales & Lefroy, 413.)

Besides, it appeared that the plaintiff had already established his title at law, before he applied to this court.

2. That the first patent to the inhabitants of *Huntington* did not include the premises; that the *bay* is an *arm* of the *sea*, and is to be considered as the *sea*, in the meaning of the patent. (1 Harg. Law Tracts, 10—18.) The second patent was similar to the first. The third patent contracts the limits of the town, on the north, and enlarges them on the south; and the defendants admit that this patent does not cover the premises. This patent was, in law, a *surrender* of the two former patents; and if so, there must be an end of the title of the defendants. (20 Vin. Ab. Surrender, 125. s. 5. 128. s. 9, 10. 129. s. 11, 12. 131. s. 25. 29. 6 Co. 69. b. 10 Co 67. b.) If the defendants have no title, the plaintiff, having shown a possession, must prevail.

That from the evidence in the cause, no further issue or trial could be necessary to enable the court to decide in

favour of the plaintiff. But if any issue should be directed, it ought to be so framed as to inquire into the title of the defendants, as well as that of the plaintiff; for, if neither party had a title, the property was in the state: and this result would have great influence as to awarding costs. But it is enough for the plaintiff to show a possession, or colourable title.

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*For the defendants*, it was insisted, that this was not a case of original equity jurisdiction. It was strictly matter of legal cognizance, of which chancery entertains jurisdiction incidentally, in order to prevent suits becoming an instrument of oppression by means of endless litigation, but which a court of law has no power to prevent. However clear and uncontradicted the evidence may have been, this court could not decree, without directing an issue at law. The suit is in the nature of a *bill of peace*. There have been two verdicts, one for each party. One verdict is not sufficient to decree in favour of the plaintiff. (4 Bro. P. C. 692—700.)

2. The third patent was not a surrender of the *fee* granted by the first and second. There can be no surrender of a *fee*, by implication. This is applicable only to lesser estates which can be merged in a greater. (Co. Litt. 337. b. 4 Cruise's Dig. 155. tit. 32. ch. 9. s. 1. 4. 6. Perkins, 585. 20 Vin. Ab. 123. pl. 5. 144. pl. 3.)

The cause stood over for decision to this day, when the *August 29th*. following judgment was pronounced by the court:

**THE CHANCELLOR.** The foundation of the bill is the legal right of the plaintiff to the three islands in dispute; and his claim to the assistance of this court arises from the peculiar state of the property, and the oppressive nature of the litigation which it involves. His case states a proper ground of equitable jurisdiction, and if the title he sets up was sufficiently established at law, before he came here, or was

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since established to the satisfaction of this court, either upon its own view of the testimony, or by verdict, upon one or more issues, to be awarded to its discretion, it would then be the duty of the court to declare that right by decree, and protect it by injunction. But, on the other hand, if the title of the plaintiff fails, on investigation, and I shall be satisfied, from all that appears in the case, that is not well founded, it would then be useless to put the parties to the expense of another feigned issue. The bill would have no real ground of support, and ought to be dismissed.

I have accordingly been led to direct my first and principal attention to the testimony bearing on the plaintiff's title.

His title rests upon the construction and location of the patent of 1688, to *William Nicoll*, his ancestor. There was no possession of the islands by any person, except occasional entries, and these were not so exclusive, steady, and certain, as to amount to evidence of right, and to supersede the necessity of paper title.

The words of the patent are easily and obviously satisfied according to the present physical state of that part of the country, without resorting to the pretensions of the plaintiff. Indeed, it is impossible to cast the eye upon any modern and accurate map of *Long Island* without being struck with the impression, that the plaintiff's construction of his patent is violent and unnatural; and nothing can reconcile us to it, but satisfactory proof that the beach on the south side of that island has undergone some great change since the date of the patent. There is a cluster of low islands, or small isles, which are separated by water, when the tide is full, but not so when the tide is down, and which are called *Fire Island*, or *Fire Islands*, and they lie between a very noted and large inlet, or gut, and the lands of *Nicoll*. It is admitted, on all sides, that they are included in the patent; and if that gut was *in esse*, at the time of the patent, it would seem, very naturally, to have been the one intended.

The words of the patent are, "all those islands, and small isles, of sandy land and marsh, or meadow ground, with the appurtenances, situate, lying, and being, on the south side of *Long Island*, between the inlet or gut, commonly called *Huntington Gut*, and the lands of the said *Nicoll*, at a certain river called *Conetquint*," &c. If the above inlet, now existing and generally known by the name of *Fire-Island Inlet*, be the one referred to in the patent, by the name of the "gut, commonly called the *Huntington gut*," it puts an end to the plaintiff's claim. To this point a great part of the testimony in the cause has been directed. On the part of the plaintiff, several witnesses have been examined to prove that, for the last 40 or 50 years, or as long as they can well remember, this *Fire-Island Inlet* has been known by the several names of *Fire-Island Inlet*, or *Gut*, the *Great Gut*, *Nicoll's Gut*, or *Nine-Mile Gut*; but not by the name of *Huntington Gut*. The testimony of *Garret Kettletas*, *Israel Howell*, *Jacob Willet*, *Isaac Thompson*, *Daniel Jarvis*, *Epenetus Wood*, *Daniel Udall*, and *Richard Udall*, goes to this fact. On the other hand, there are several witnesses examined on the part of the defendants, who testify to the same length of time, and that *Fire Island Inlet* was known, as well by the name of *Huntington Gut*, or *Huntington East Gut*, as by the other names above mentioned. This appears from the testimony of *Luke Ruland*, *Moses Wicks*, *Caleb Saxton*, *James Pearsall*, *Gilbert Wicks*, *Joseph Ruland*, *Joseph Ketcham*, and *Arthur Dingee*. There may be a few more witnesses on one side or the other, whose testimony has some relation to this point; but it is unnecessary to be more particular. The weight of this testimony, in respect to the name, is on the side of the defendants, from this circumstance, that the witnesses on that side speak affirmatively, as to a fact within their knowledge, of the name of *Huntington Gut*, or *Huntington East Gut*, and the plaintiff's witnesses can only speak negatively of their having no knowledge of any such name so applied. But after all,

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there is much uncertainty in the attempt to designate the gut, by the shifting and changing names used within the last fifty years. The patent goes back 125 years, and speaks of the name then commonly given to the inlet.

The plaintiff has, however, proved affirmatively, by several witnesses, as *Garret Kettletas, Isaac Howell, David Willet, John Arthur, and Epenerus Wood*, that there was formerly a gut to the westward of the islands in dispute, and now filled up, which was called *Huntington Gut*. On the other hand, it is proved by *Caleb Sartor, Gilbert Wickes, Joseph Ketcham, and Richard Udall*, that *Gilgo Gut* (and which now appears on the maps to be west of the town of *Huntington*) was anciently known by the name of *Huntington West Gut*, or *Huntington Gut*; and one of them said it had been called *Huntington West Gut* by old whalers, who have been dead forty years; and another said, that the temporary gut, opposite *Cedar Island*, was called *Huntington West Gut*, as contradistinguished from *Fire Island Inlet*, which was called *Huntington East Gut*.

With respect to this intermediate gut, between *Fire-Island Inlet* and *Gilgo Gut*, (the two plain and noted inlets, which, and none other in that quarter, are known to modern times and modern maps,) it appears to have been very temporary, and soon disappeared. The whole testimony concerning it, is loose tradition, and involved in darkness and fable. *Jacob Seaman* says, that about fifty years ago, the ocean broke through the beach, between *Fire-Island Gut* and *Gilgo Gut*, with great violence, and formed what was called *Cedar-Island Gut*, but which in a few years was filled up, and gone. *Isaac Thompson* speaks, also, but loosely, of a gut called *Huntington Gut*, between *Cedar* and *Oak Islands*, now disappeared; and he says, that within his memory, the water has several times broke through the beach, and that the inlets afterwards closed up. Though several of the plaintiff's witnesses have designated one of these intermediate and temporary guts, as having been

known by the name of *Huntington Gut*, yet, I think, we must be governed by mere conjecture, in fixing on any of these transient inlets as the inlet intended by the patent of 1688. Why should we be seeking, through the most vague and contradictory traditions, for some extinguished inlet, which may enable the plaintiff to embrace islands lying far west, and *collateral* to his lands, when we have, in front of his farm, a large inlet of unknown antiquity, which includes between it and his lands the little islands lying against or opposite his lands, and which so readily corresponds with the words of the patent?

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But it is contended, that even *Fire-Island Inlet*, though now nine miles wide, did not exist at the date of the patent. If this be really so, we are then reduced to the necessity of exploring in the dark for the inlet in question. The bill admits, that it is now difficult to ascertain the one intended. To prove the commencement of *Fire Island Inlet* since 1688, the testimony of *John Arthur* and *Richard Udall*, is relied on. The first witness says, that he always understood, from a boy, (and as he said this in 1770, and was then seventy-four years old, he must refer back to within thirty years of the patent,) that *Fire-Island Inlet* broke through after *Nicoll* settled there, and that it used to be called the *New-Gut*. The other witness says, that old Mr. *Willis* told him, that he had been informed by his ancestors, that *Fire-Island Gut* broke through in the winter of 1690, or 1691, in a storm. This, at best, is improbable, and rests on foundations too weak. The sudden existence of such a grand inlet as that, known in the memory of the oldest witnesses by the names of the *Great Gut* and the *Nine Mile Gut*, and which was a passage for privateers during the revolutionary war, must have been ascertained with much greater historical certainty; for it would have been regarded as a remarkable phenomenon in the natural history of the country. The inlet may, probably, have extended itself gradually towards the west. Several of the witnesses attest to this, and the fact

1814. applies equally to *Gilgo Gut*; but this progress must have been very gradual, for *Isaac Thompson*, who lived opposite *Fire-Island Inlet* forty-nine years, says, only, that from the appearances and changes within his knowledge, he thinks it quite probable that, formerly, the east shore of the gut was as far eastward as the end of *Fire Island*. If this was so, then the description in the patent applied most precisely to the *Fire Islands*, and to them only.

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The patent to *William Smith*, in 1693, is a most important item of testimony, in the consideration of this question of fact; with me, it has all the preponderance so justly due to written, over parol proof, especially when we are referring to times far beyond the memory of man. That patent was for lands bounded west on *East Conetquont river*, and east on *Mastick river*, and down on each side to the main sea, with the islands in the bay, "from a certain gut, or inlet, westward, commonly called *Huntington East Gut*, to a place on the beach, eastward, called *Cuptuange*, being the west bounds of *Southampton*; the beach and bay being twenty-four miles east and west." The present *Chief Justice*, who tried the feigned issue heretofore awarded in this cause, on the point whether the title of the three islands was in the plaintiff, certified, that this patent to *Smith* was offered in evidence upon the trial, and was located by parol proof; and that it appeared that the gut, in the patent to *Smith*, called *Huntington East Gut*, was the same with the one mentioned in the pleadings and testimony in this cause, by the name of *Fire-Island Inlet*; and that running west from the west bounds of *Southampton*, the twenty-four miles would terminate some distance to the east of *Fire-Island*, making the probable width of the gut, at the date of the patent, from three and a half to five miles, being nearly the width of *Nicoll's* land on *Long-Island*. He further certified, that he told the jury, if *Huntington East Gut*, in the patent to *Smith*, was the same with *Huntington Gut*, in the patent to *Nicoll*, the islands in question were not included in his

patent, and that he was of that opinion, and so told the jury, who accordingly found a verdict for the defendants. This patent to *Smith* does away all pretence of the creation of *Fire-Island Inlet*, by some violent action of the sea, since 1688; for, if it existed in 1693, and was then a familiar passage, "commonly called *Huntington East Gut*," it is quite certain it was not "the new gut," suddenly brought into existence by a storm, within the two or three preceding years.

From this view of the case, I am perfectly satisfied that the patent to *Nicoll* does not extend to *Captree, Oak, and Grass Islands*, and there is no need of any further issue to inform and satisfy my judgment. I have given the plaintiff the benefit of the testimony excluded on the issue; for I have taken it all into consideration in forming my conclusion.

I have not placed reliance on the evidence which the plaintiff has given, of the use and possession of the islands, because, as I have already observed, (and the fact appears abundantly in the testimony,) the islands are not capable of any other possession, occupancy, or real use, than occasional and periodical entries to cut the grass and sedge; and the testimony as to this use, is quite as strong, if not much stronger, in favour of the defendants. Several witnesses have testified to the claim and use of the islands, by the plaintiff and his ancestors, from the time of the lease to *Howell* and *Smith*, in 1768, down to the time of filing the bill; but as many, and, perhaps, more witnesses, testify to a similar claim and occupancy, during the same period, by the defendants, and those claiming under the town of *Huntington*, the result is, that possession must be adjudged to belong to, and to be in, the party who has the right; and as the plaintiff has no title, he has no lawful possession. The equity of his bill has totally failed.

It cannot be material whether the title set up by the defendants be good or not, as to the point of the dismissal of

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the bill. If they have no title, yet the bill must be dismissed, because the plaintiff has no title, and, consequently, no equity to support his case. But it is a very different question, whether the bill shall be dismissed with, or without, costs. On this question, I have felt some embarrassment. Costs are always discretionary in this court. They are awarded, as Lord Hardwicke has observed, (2 *Atk.* 552,) not from any statute authority, but from conscience, and *ex arbitrio boni viri*, as to the satisfaction due on one side or the other. A general denial of costs, in all cases, would be holding out encouragement to great vexation, without any recompense, and therefore, costs usually follow the justice of the case ; but they do not always follow the event of the cause. There are cases in which costs have been denied, though the plaintiff failed, when he had probable cause of suit. (*Trethewy v. Hoblin*, 2 *Ch. Cas.* 9.) So, where infant heirs revived a cross bill, and entered into very long and expensive examinations, to set aside a deed, and failed, yet costs were denied against them, as they had probable cause to contend. (*Shales v. Sir John Barrington*, 1 *P. Wms.* 481.)

In the present case, it strikes me that the plaintiff had probable cause to come here. His ancestors had maintained a long and steady claim to the islands in dispute, and had leased one of them as early as the year 1768. He had also succeeded at law in an action of trespass, tried at the *Suffolk* circuit, in which he had alleged a seisin in himself, and the defendant had alleged a freehold in *Huntington*, and on the traverse of the defendant's title, the issue had been found for the plaintiff. Other trespass suits between the parties were still pending ; and, with respect to the merits of the case, as it appears before this court, the defendants, when brought in, deny the plaintiff's title, and set forth the patents under which they claim an exclusive title to the premises. The issue awarded here was upon the title of the plaintiff, but the defendants' title was brought into view, and to the notice of

the court, by the pleadings ; and on the trial of the issue, and on the argument in this court, the learned judge before whom the cause was tried, certified, that he gave it as his opinion to the jury, that the patents under which the defendants claimed did not cover the islands in dispute. I do not wish to give any decided opinion on that point. When a cause resolves itself into a dry legal question, the proper *forum* for the determination of it is a court of law, and I only notice that title here incidentally, as it serves to guide me in the exercise of a suitable discretion as to costs.

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It is admitted that the last patent to *Huntington* does not touch the islands. If the defendants have a title, it is under their first patent, of 1666, and the terms of it are extremely vague as to the southern boundary, and the better opinion is, that it is limited, in breadth, to the "nine several necks of meadow ground;" if that be so, the premises are excluded. These necks are undoubtedly to be taken in continuity. *Ad proximum antecedens fiat relatio.* It is a general principle, in the construction of written instruments, that a particular specification will exclude things not specified. But, whatever doubts might have existed under this patent, I consider them as removed by the last patent of 1694, which was granted on the petition of the inhabitants of *Huntington*, and was intended as a substitute for the preceding patents, "so as that the limits and bounds of their town should not be as above mentioned, but as hereafter expressed." The clear definition and location of the southern boundaries of their town, by this last patent, certainly excludes the inhabitants of *Huntington* from resorting to the vague and indefinite description of the former patents, even if we suppose, in opposition to the usage under our government, that there are technical difficulties in the way of a legal surrender to government of an estate in fee.

If, then, the plaintiff had probable cause for instituting his suit, and the defendants have been litigating against his claim, without any better claim or title on their part, I think it forms

1814. a very reasonable case for the denial of costs on either side.

LYON  
v.  
TALLMADGE.

Bill dismissed without costs.

August 30th and 31st. LYON & BROCKWAY against TALLMADGE AND OTHERS.

Where a bill, on demurrer, is dismissed for want of equity, on the merits of the case, as stated, leave to amend the bill will not be granted.

Amendments are granted only where there is some defect, as to parties, or some omission, or mistake, of a fact or circumstance, connected with the substance of the case, but not forming the substance itself, or where there is some defect in the prayer for relief.

THE bill stated, that *Brockway* was imprisoned on a *ca. sa.*, at the suit of *Tallmadge* and others; that *Lyon & Brockway*, and the defendant, *Dewey*, as surety, gave to *Richmond*, sheriff of the county, one of the defendants, a bond for the liberties of the goal. '*Tallmadge & Co.*' brought an action against the sheriff, for the escape of the defendant from the gaol liberties, which was tried in *June*, 1811, and the jury, under the direction of the judge, found a verdict for the plaintiffs. It appeared on the trial, that *Brockway* returned within the liberties before suit brought. A case having been made and argued, before the supreme court, judgment was given thereon, for the plaintiffs, in *May*, 1812; and the case having been, by consent, turned into a special verdict, a writ of error was brought to the court for the correction of errors. *Lyon* and *Dewey* undertook to defend the suit brought against the sheriff for the escape, and employed counsel for that purpose; and, to indemnify the sheriff, confessed judgment on the bond which had been given for the gaol liberties. *Tallmadge* and others offered to relinquish the judgment which they had

obtained against the sheriff, for the escape of *Brockway*, if the sheriff would assign to them the judgment confessed to him on the bond given for the gaol liberties. The sheriff informed the plaintiffs and *Dewey*, the person who gave the bond, of this proposal, and that he should accede to it, unless they would deposit the money, or give further security for his indemnity, which they were unable to do; and the sheriff, in *September*, 1813, against the wishes, and without the assent, of the plaintiffs and *Dewey*, assigned the judgment he had obtained against them on the said bond, to *Tallmadge & Co.*, who thereupon released the judgment they had obtained against the sheriff for the escape; and which prevented the further prosecution of the writ of error, brought on that judgment. That *T. Mumford*, as attorney for *Tallmadge & Co.*, applied to *Lyon*, and representing to him the danger of having the payment of the whole judgment fall on him alone, if there should be any delay, obtained the consent of *Lyon*, that execution should immediately issue on the judgment; and an execution was accordingly issued against the plaintiffs and *Dewey*, and levied on their real and personal estates, which were sold by the sheriff, at auction, for an inconsiderable sum. The plaintiff, *Lyon*, alleged, that *Dewey*, being displeased at *Lyon's* having consented to the issuing the execution, had associated himself with *Tallmadge* and others, the plaintiffs in the suit at law, and had become hostile to the plaintiffs, and unwilling to do any act favourable to the plaintiffs, or unfavourable to the defendants, with whom he had made his peace. That the proceedings in the suit had been stayed by an order of the supreme court, but he, *Lyon*, apprehended that steps would be speedily taken to dispose of his property under the execution; that the question as to the liability of the sheriff for the escape, where the prisoner returned before suit brought, had been brought before the court of errors, in a similar case; and the judgment of the supreme court, in *Tillman v. Lansing*, on which the court relied in giving judgment in

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 LYON
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1814. the suit of *Tallmadge and others v. Richmond*, had been
~~LYON~~
TALLMADGE reversed.

The bill, then, stated some agreement that the case of the plaintiffs should be brought within the last decision of the court of errors ; and there was a prayer for general relief, and for an injunction to stay all proceedings, by the defendants, on the judgments at law.

There was a general demurrer to the bill.

Gold, for the plaintiffs, cited 10 *Johns. Rep.* 509. 549. 563. *Pothier on Oblig. par. 4. c. 3. s. 6. Hinde's Pr.* 17. *Barton's Suit in Equ.* 40. 2 *Atk.* 3. 13 *Vesey*, 114. 2 *P. Wms.* 156. 3 *Atk.* 755. *Dickens*, 533. *Cooper's Eq. Pl.* 129. 139. *Mitford*, 4. 2 *Johns. Cas.* 1. 2 *Powell on Cont.* 163, 164. 2 *Vesey*, jun., 253.

Riggs, contra.

August 30th. THE CHANCELLOR. There is no equity appearing on the face of this bill. The assignment of the judgment against *Lyon and Dewey*, to *Tallmadge and others*, and the release of the judgment against *Richmond*, are not charged as fraudulent acts, or done with a fraudulent intention. The very state of the case repels any possible presumption of fraud. *Richmond* gave notice to the plaintiffs of the proposition made to him, and required of them the deposite of the sum, for which he stood charged, so as the more effectually to indemnify him ; that was not done. He then required additional security : that was not given ; and he told the plaintiffs that he should make the assignment, if this effectual indemnity was not given. There was no concealment or fraud in the case ; but due notice was given of his intention. Nor was it an unreasonable or oppressive demand on the part of *Richmond*. He stood charged with the escape, by the judgment of the supreme court ; and *Lyon and Dewey* stood

behind him, and were bound to save him harmless. He had a right to be acquitted and discharged from all hazard, and was not bound to permit a litigation to go on in his name, and at his risk. He had a right, at any time, to relieve himself from the burthen of the risk, and of the litigation, by placing the surety in his place, with all his means of defence. It was a right founded on a clear fundamental principle of equity. This he offered to do, and asked only a deposite of the sum for which he stood charged; or, if that could not be done, that he should receive additional security. There is no hardship, or injustice, or fraud, imputed to *Richmond*, either by any averment, or by the facts stated in the bill. But the bill admits, that, after all this was done, the plaintiff consented that the assignees should issue execution on the judgment confessed. If ever the maxim applied, it does here, that *volenti non fit injuria*. With a knowledge of all the facts, and as the last act in the history of the case, the plaintiff consents to have his, and his co-sureties' property charged in execution, and sold for the payment of the debt. This consent is alleged to have been obtained upon the representations of *Th. Mumford*, as counsel for the defendants; but *Mumford* is no party to this bill, and is not called upon to answer to the truth of those representations, nor are these representations even charged as being untrue, or made with any fraudulent intention.

The bill, therefore, does not contain any *gravamen*, or equity. There is nothing that the defendants need to answer. The bill must be dismissed with costs.

Gold, for the plaintiff, then moved for leave to amend the bill.

Riggs, contra.

THE CHANCELLOR. The motion for leave to amend the *August 31st.* bill, is not founded upon any specified omission or imperfec-

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1814. *Lyon v. Tallmadge.* The demurrer was decided upon the merits, and on the ground that the bill contained no equity. A general leave to amend would be the same as leave to make a new bill, and I think the indulgence of amendments is not to be carried so far. If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. But the substance of the bill must contain ground for relief. There must be equity in the case, when fully stated, and correctly applied to the proper parties, sufficient to warrant a decree. Here, as I have already observed, the substance of the bill is defective. The plaintiff gives a plain and candid statement of his case, and it cannot entitle him to relief, for the reasons assigned in pronouncing the decree. In the absence of authority, I should deny this motion; because, as far as the doctrine of amendments can be reduced to general rules, or principle, it is against it. But there are cases which govern the present one. In *Napier v. Effingham*, (2 P. Wms. 401,) Lord Ch. King observed, that there was not any precedent, in this court, of an amendment to a bill in a part wherein it has been dismissed upon the merits; and in a case before Lord Talbot, and which is cited by Mr. Cox, in his notes to *P. Williams*, (2 P. Wms. 300,) the Chancellor observed, that, after a demurrer to the whole bill allowed, the bill was regularly out of court, and there was no instance of leave to amend it.

Motion denied, with costs.

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GELSTON
v.
CODWISE.

D. GELSTON *against* CODWISE, MORRIS, MOWATT, AND
OTHERS.

Sept. 3d.

On *appeal* from this court, the decree or order of the court for the correction of errors becomes, to this court, the law of the case ; and the party can have no other, or further relief, than what is administered by the decree of the court above.

THE bill gave a summary of the suits and proceedings of *Codwise* and others against *Sands* and others, of whom the plaintiff was one, and on a petition presented to this court by *Gelston*, the order of the courts thereon, and the decree of the court for the correction of errors, on appeal. It is unnecessary to detail the voluminous proceedings in these causes. The substance of them is to be found in the reports. (10 *Johns. Rep.* 507—524.)

The material facts are, that certain real estates of *Comfort Sands*, a bankrupt, at *Brooklyn*, and in *Pine* and *Cedar-streets*, in *New-York*, the conveyances of which, by the bankrupt, had been set aside as fraudulent, were ordered to be sold by the master, and the money brought into court, to be distributed among the creditors of *Sands*. The plaintiff, a judgment creditor, pending an appeal in the original suit, (4 *Johns. Rep.* 636.,) presented his petition, stating his judgment as a *lien* on the real estate of *Sands*, and praying an order for the payment of the amount, after the satisfaction of prior encumbrances; the hearing of the petition was deferred until the fund was brought into court. Pursuant to the decree of the court above, the moneys were ordered, on the 25th of *June*, 1808, to be paid over to the assignees of the bankrupt. In *March*, 1809, the bill, as it regards *Gelston*, and his petition, were heard, and the bill discussed, with costs.

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In *February*, 1810, *Gelston* presented another *petition*, stating mistakes in drawing up the decree, in ordering his judgment to be paid, according to its priority, in preference to the general creditors, nor the priority of the liens to be ascertained and settled ; and because the decree made no order or direction allowing or dismissing the former petition ; and he, therefore, prayed a *rehearing* on those two points : and this petition for a rehearing was, on the 12th of *September*, 1810, dismissed with costs. The court for the *correction of errors*, in *March*, 1812, on appeal from this decision, as well as on a *cross appeal* from the decree of the court, in *September*, 1809, dismissing the bill against *Gelston*, ordered the cross appeal to be dismissed, with 100 dollars costs, and the decree of this court to be affirmed : and that court, "further considering that the moneys arising from the real estate, formerly of *Comfort Sands*, in *Brooklyn*, in the pleadings mentioned, and which are now in the court of chancery, or may hereafter be brought therein, ought, (after paying costs, &c.) to be applied to the payment and satisfaction of the judgment creditors of *Comfort Sands*, whose judgments were docketed previously to the bankruptcy of *Comfort Sands*, according to the priority of the time of docketing, in preference to the other creditors of *Comfort Sands*;" "ordered, adjudged, and decreed, that the order of the court of chancery, of the 12th of *September*, 1810, be, and the same is hereby reversed;" and it further "ordered, that the cause be remanded to the court of chancery, to the end, that the court may direct an inquiry, &c., and what judgments remain open, unsatisfied of record, against *Comfort Sands*, and which were docketed previous to his becoming a bankrupt, and the amount thereof respectively, and the order, in point of time, in which they were docketed ; and that the court of chancery, after deducting the costs, &c., and, also, the amount due on all the judgments standing open and unsatisfied of record, against *Comfort Sands*, and which were docketed

prior in point of time to the judgment obtained by *David Gelston*, shall cause the residue, if any, to be applied to the satisfaction of the judgment of *David Gelston*, together with the interest."

"And further, that on the inquiry as to the judgments against *Comfort Sands*, docketed previous to the judgment in favour of *David Gelston*, which may be directed by the court of chancery, the fact of the prior judgments remaining open and unsatisfied of record, and satisfaction not voluntarily confessed before the master, shall be conclusive against *David Gelston*, as to the amount to be retained, in preference to the satisfaction of his judgment."

The bill further stated, that certain of the judgments standing unsatisfied on record against *Sands*, prior to the judgment of *Gelston*, had been paid, or discharged, or ought not be considered as *liens*, for reasons stated; that the assignees had sold other real estates of *Comfort Sands*, the proceeds of which had come to their hands: and that the assignees had obtained out of court, the proceeds of the sales, by Mr. *Hildreth*, the master, amounting to above 28,000 dollars; but when applied to, had refused to pay the amount due to the plaintiff on his judgment, on the pretence that the decree only directed the payment to be made out of such moneys as were then in court, or might thereafter be brought in; and that they having obtained the moneys previous to this decree, they were not bound to apply the same to the payment of the judgment, though they well knew that the amount was more than sufficient to pay all the judgments unsatisfied of record prior to the plaintiff's judgment; and that the plaintiff was, therefore, compelled to file his bill against the defendants, in the nature of a *supplemental* bill, to have the full benefit of the decree; and he prayed for a discovery; and that the principal and interest of his judgment might be paid to him out of the moneys received by the defendants; and for general relief.

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The defendants, in their *answer*, stated, that, in *May*, 1812, on the *remitititur* to this court, from the court of errors, the plaintiff applied for, and obtained, an order of this court, referring it to a master, to take an account of what *Codwise* and others had expended, &c., for costs, &c.; what judgments remained open and unsatisfied of record against *Comfort Sands*, docketed before his bankruptcy, and their priority in point of time. And directions were given, conformable to the decree of the court above, as to the judgments remaining open, and unsatisfied of record, unless voluntarily confessed to be paid; and directed the master to report thereon with all convenient speed; and it was thereupon decreed, that the said decree of the court above should be carried into effect in this court. And the defendants insisted, that inasmuch as this court, and the court above, did not order the moneys in the hands of the assignees, or of the master, to be brought into court, to answer the demand of the plaintiff, but restricted him for payment, to the money *then* in court, or thereafter to be brought into court, arising from the sales of the *Brooklyn* estate; and as the said decree has been procured by the plaintiff himself, he can have no equitable relief, beyond the scope of that decree, which, and the order of reference to the master, being in full force, are, they insisted, a bar to the plaintiff's demand, and the relief sought by his bill.

The defendants, also, answered the other matters charged in the bill; and the cause being put at issue, several witnesses were examined; but it is unnecessary to state the evidence here.

*Pendleton* and *S. Jones*, jun., for the plaintiff. They cited *Mitford's Pl.* 86, 87. *Cooper's Pl.* 99, 100. 4 *Johns. Rep.* 538. 10 *Johns. Rep.* 507. 520. 522.

*Harrison*, and *Riggs*, contra. They cited *Mitford's Pl.* 79—82. 3 *P. Wms.* 371. *Cooper's Pl.* 88, 89. 3 *Atk.*

809. 2 *Vesey*, 571. 1 Ch. Cas. 43, 44. 2 *Vesey*, 232.  
 2 Atk. 349. 1 P. Wms. 723. Cas. temp. Talb. 201.  
 2 Atk. 107. *Forest. Rep.* 65.

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**THE CHANCELLOR.** This bill is founded on the decree of the court for the correction of errors, of *March, 1812*, (10 Johns. Rep. 523.) which declared, that the moneys arising from the real estate of *Comfort Sands*, at *Brooklyn*, and which were then in the court of chancery, or might thereafter be brought in, after paying the costs and charges of *Codwise* and others, ought to be applied to pay the judgment creditors of *Sands*, whose judgments were docketed prior to his bankruptcy, according to priority, in preference to his other creditors. The bill accordingly calls for a discovery of the state of these several judgments, and the amount due thereon; and that the defendants may pay the plaintiff the amount of his judgment, out of the moneys arising from the proceeds, generally, of all the real estates of *Sands*.

But the decree went further, and prescribed, specially, the terms of the relief afforded to the present plaintiff. This court was to direct an inquiry as to the costs and charges of *Codwise* and others, and as to the judgments which were docketed prior to the bankruptcy of *Sands*, and remained unsatisfied of record; and that those costs, and the unsatisfied judgments of record, prior in point of time to that of the plaintiff, were first to be deducted from the particular fund so appropriated to pay the plaintiff. The decree further directed, that, upon such inquiry, the fact of prior judgments remaining unsatisfied of record, and of which satisfaction was not voluntarily confessed before the master, was to be conclusive upon the plaintiff, as to the amount to be retained, in preference to his judgment.

Upon these terms, and in obedience to that decree, an inquiry was directed by this court; and the plaintiff, finding that this course would not exactly meet his wishes and pur-

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pose, has filed the present bill, which is not strictly a bill to carry the decree of the court above into execution, but is more like a bill of review, to correct the alleged imperfection of that decree. The bill seeks relief out of the proceeds of all the estate of *Sands*, without confining himself to the proceeds of the *Brooklyn* estate ; and it seeks for a discovery of the payment of the judgments by other means than the record, or the voluntary confession of the party ; and it seeks for payment from moneys not then in chancery, nor afterwards brought in, but which had been previously appropriated by the officers of the court. In all these respects, the bill seeks for relief *beyond* the terms of the decree, though that decree was obtained on his own motion, and on his own appeal.

The defendants, accordingly, in their answer, among other things, insist, that the plaintiff is limited to the terms of that decree, and the order made, in this court, to carry it into effect ; and this they insist on as a bar to this suit, especially as that decree is in full force, and was obtained by the plaintiff's own seeking.

It struck me, at the very threshold of the argument, that the terms of that decree were the law of this court, and that no decree can be made here, or relief given to the parties in that suit, in variation from that decree. The more I have since reflected upon the case, the more I am impressed with the conviction that this is a solid principle, and one well grounded in reason and authority.

It is the acknowledged doctrine of a court of review, to give such decree as the court below ought to have given ; and when the plaintiff below brings the appeal, the court above not only reverses what is wrong, but decrees what is right, and models the relief according to its own view of the ends of justice, and the exigencies of the case. The act organizing the court for the correction of errors, declares, that "on appeals from any decree or order of the court of chancery, the court above is authorized and required, final-

ly, to determine the same, and all matters concerning it ; and to reverse, affirm, or alter the decree or order, and to make such other decree, or order, therein, as equity and justice shall require." The court above acts, therefore, on appeals, in the given case, with all the plenitude of a court of equity of original jurisdiction ; and the special terms of the decree, whatever they may be, become, to this court, *the law of that case*, and no other, or further relief, can be administered to the party.

Were it otherwise, there would be no such thing as a final end to litigation, and suits and decrees, on the same subject matter, would be multiplied so as to become embarrassing, inconsistent, and oppressive. It is infinitely better that decrees, in the last resort, however inconvenient or incomplete in their particular provisions in the particular case, should be acquiesced in, and finally close the controversy, than that they should be permitted to be amended, or extended by new original bills between the same parties, on the same subject matter. Such a precedent as the one now sought for, would tend to fix a character of dangerous instability and uncertainty on the administration of justice.

It may sometimes become impossible, from accidents, &c., to carry a decree into effect, without a further decree of this court ; but the general rule, in such cases, is not to vary the decree, even of the same court, except in certain cases where there may have been a mistake ; (*Mif. 87. 1 Ves. 245.*;) and it is said, that the house of lords, upon appeal, considers the law of the decree not to be examined on a bill to carry it into execution. (*Mif. 86, 87. Cooper, 99.*) So, on a bill of revivor, the plaintiff cannot controvert the decree, whatever the defendant may do. (*2 Ves. 232.*) It is well settled, that a decree can never be impeached by an original bill ; it can only be questioned by a bill of review. If a decree could be altered, or varied, by an original bill, a cause, as it has been frequently observed, would never be at rest, and there would be confusion and inconsist-

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ency in the decrees of the court. (*Read v. Hambez*, 1 Ch. Cas. 44. *Taylor v. Sharp*, 3 P. Wms. 371. *Wortley v. Birkhead*, 3 Atk. 809. 2 Ves. 571. *Shepherd v. Tilley*, 2 Atk. 348.)

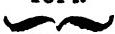
These are principles laid down in a series of decisions relative to decrees in the same court; but with respect to the decrees of the court of appeals, the objection applies with much greater force, since in that case, the weight of authority is added to the sanctions of policy. It was, therefore, doubted by Lord Redesdale, (*Mitf.* 79.) whether even a bill of review, upon error in the decree itself, can be brought after affirmance in parliament. The case of *Barbon v. Scarle* (1 Vern. 419.) was somewhat analogous to the present attempt; but it seemed to be admitted as a settled point, that, after judgment upon appeal in the house of lords, this court could not intermeddle further than to settle so much of the cause as the lords had remanded, and that it could not reverse or alter the order of the court above.

The object of the present bill is to vary essentially the decree above, and to accommodate it to a new equity set up; for here is a different and much more extensive relief sought for, and one depending on different proof. But the decree above must be taken to be conclusive throughout, and it must be carried into effect in the mode there prescribed, and in no other; if it be not binding upon both parties, it cannot be binding upon either, and the whole decision would be set afloat. I am satisfied that this court cannot, with propriety, exercise the jurisdiction prayed for. The plaintiff must content himself with the terms of that decree, or he must come here upon equal terms with other creditors for his distributive share of the bankrupt's estate, or he must be left to pursue his remedy at law upon his judgment. He elected his own mode of application to this court, in the first instance; and he afterwards, voluntarily, sought and obtained a decree in his favour in the court above. He is, and ought to be, concluded by the equitable relief tendered to

him by the terms of that decree. He cannot be permitted to reject those terms, and come here for a new decree.

The counsel for the plaintiffs do not consider this merely as a bill of revivor or supplemental bill to carry the decree above into effect, for, in that view, it would be wholly unnecessary and useless, as nothing has happened to defeat the provision in that decree. They assert it to be an original bill, founded upon the equity contained in the decree in error. In that view, and for the reasons alleged, the bill must be dismissed, with costs.

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v.

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Decree accordingly.

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BETTS against BETTS.

Sept. 8

Where a bill for a divorce, on the ground of *adultery*, is taken *pro confesso*, or the defendant, in his answer, admits the adultery charged, and a reference is made to the master, under the 3d section of the act concerning divorces, (2 N. R. L. 197, 198.) to take the proof of the adultery, and to report thereon, &c. by the proofs to be taken by the master, is meant legal proof generally; and he may, therefore, receive proof of the *confession* of the defendant, which must, however, be connected with, and supported by, other proofs, before the court will decree a divorce *a vinculo matrimonii*.

But, by the 51st rule of the court, June, 1806, evidence of the confessions of the defendant is not admissible at all, on a signed issue awarded to try the fact of adultery. Whether this rule has not gone too far in rejecting this species of proof altogether? *Quare.*

THE plaintiff filed a bill for a divorce against the defendant, her husband, charging him with adultery and cruel usage. The bill was taken *pro confesso*, for want of an answer; and a reference was made to a master to report the facts, and his opinion thereon.

The master reported, 1. Cruel usage by the defendant, of his wife. 2. Evidence of adultery, in his opinion satisfac-

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tory, and that the evidence consisted of the testimony of three witnesses. The first witness testified, that he had been at houses of ill fame in *New-York*, once or twice, with the defendant, but did not stay long, and that he never saw the defendant alone with any woman, at such places, nor does he know that he slept at any such house, or that he had criminal intercourse with any woman. That the defendant once told him he had the bad disorder, and by which he understood him to mean the venereal disease. Another witness testified, that the defendant confessed to her he had the venereal, and took it from a girl at *New-York*, and that he had had a child by a certain other girl. She, also, proved acts of cruelty. The third witness, also, proved acts of cruel usage.

H. Jones, for the plaintiff, moved for a confirmation of the report on the facts therein stated, and for a decree of divorce *a vinculo*, &c.

THE CHANCELLOR. The courts have gone no further on the trial of the issue on a bill of divorce, than to receive proof of the confessions of the party as competent testimony, *when connected with other proof*. (*Doe v. Roe*, 1 *Johns. Cas.* 25.) But, by the 51st rule of this court, in *June*, 1806, such evidence is not now admissible at all, on a feigned issue to be awarded, to try the fact of adultery. It might be questioned, whether that rule has not gone too far, in wholly rejecting this species of proof, though the statute evidently intended that a divorce for adultery should be founded on *other proof*, in addition to the mere confessions of the party. By the 3d section of the *act concerning divorces*, if the defendant, by his answer, admits the adultery charged, or the bill is taken *pro confesso*, for want of an answer, a master must still be directed to take proof of the adultery, and the cause is to be heard on such proofs previous to a final decree. I think I should not be warranted in saying that the

master was not to take any proof of confessions of the party; for the confession of the accused is a legitimate species of proof, which is recognised throughout the whole law of evidence; and when the statute speaks of "proof," generally, without mentioning any species of it, we are to understand it as meaning legal testimony at large, as known and established in law. The party's confession may, and does, aid other proof; but the decree must not rest alone, nor, perhaps, essentially, on such confessions, for there is great danger of collusion between the parties, or of confessions extorted, or made designedly, to furnish means to effect a divorce. These confessions are, therefore, to be received, in this case, with jealousy, and to be weighed with caution, and to be supported by facts and circumstances tending to demonstrate the charge to the satisfaction of the court.

The rule was derived from the ecclesiastical law, and is well settled, that the confessions of the party are admissible on a charge of adultery, *if supported by other proof*; but unless corroborated by other evidence and circumstances, they are not sufficient ground for a decree. (*Burn's Eccl. Law*, tit. *Marriage*, s. xi. *Baxter v. Baxter*, 1 *Mass. Rep.* 346. *Holland v. Holland*, 2 *Mass. Rep.* 154.) The same doctrine, as to proof, is laid down in the *Traité de l'Adultere*, par *M. Fournel*, (p. 160., which is a full, accurate, and finished essay, on the whole subject, with all the principles to be collected from the civil, the canon, and the French law. The confession of the party is there held to be competent testimony; but then it must be supported by strong presumptions, and by some determinate facts. *Adulterium non probatur contra alium, sola mulieris confessione.*

The present case may be said to rest almost wholly on proof by confession; for the circumstance of the defendant's being seen once or twice in a house of ill fame, in the way stated, is too slight and equivocal a circumstance to supply

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v.

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1814. the defect of the other proof. It is not satisfactory evidence
RADLEY of guilt, nor of the sincerity of the confession ; and this is
v. the only fact exhibited in corroboration of the confessions.
SHAVER. The proof is, then, not sufficient to justify a decree dis-
solving the marriage, though it is enough for a decree of
separation from bed and board, on the ground of cruel usage,
by frequent personal violence, &c. ; and I shall, according-
ly, make such a decree.

Decree accordingly.



RADLEY AND OTHERS *against* SHAVER AND OTHERS.

A regular decree on the merits cannot be set aside on *motion* ; and it seems
that where it is sought to set aside a decree on the ground of surprise and
irregularity, the course is to apply by *petition*.

THIS was a motion to vacate the decree entered in
this cause, and all proceedings subsequent to the 17th of
December, 1800.

It appeared from the affidavits, which were read, that the
bill was filed on the 8th of *March*, 1799, and the answer put
in on the 2d of *September*, 1799. The solicitor of the de-
fendants received a copy of the rule to produce witnesses, in
January, 1801, and the plaintiffs' solicitor consented, after
the rule had expired, that the defendants should produce their
witnesses. And, after the rule for publication was passed,
in 1814, the plaintiffs' solicitor consented that he should
examine witnesses. The proceedings, on the part of the
plaintiffs, were perfectly regular. The cause was brought
to a hearing, pursuant to regular notice, in *August*, 1813, and
a decree pronounced in *December* following. There were,
also, affidavits of merits on the part of the defendants, and it

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appeared that his solicitor had been very negligent in his cause.

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RADLEY
V.
SWAVER.

Van Vechten, for the plaintiff.

P. W. Yates, for the defendant.

THE CHANCELLOR. A regular decree on the merits cannot be set aside upon motion. The case in 1 *Ves. jun.* 93. is to this point ; and there is no irregularity in this case charged on one side, but what is denied on the other. Nothing appears but the grossest neglect of duty, by the defendant's solicitor, and a regular, but most indulgent conduct on the part of the solicitor for the plaintiffs. The examination of witnesses after publication had passed, was at the instance, and with the consent of the defendant's solicitor, and as a special indulgence to him. From the case of *Floyd v. Nangle*, (3 *Att. 568.*) it seems that the course to set aside a decree, for surprise and irregularity, is by petition ; but here is no irregularity to be admitted ; for every act complained of, and proved, was by the consent and solicitation of the defendant's solicitor, and he is concluded from setting it up as irregular. It would appear that the defendant has been almost deserted by the person to whom he entrusted his defence, and that the merits of this case ought to be looked into ; but this is not the mode. I should apprehend, that a petition for a rehearing would be the proper course, but on this I do not pretend to decide. It is sufficient that here is a decree regularly obtained, but not yet perfected, and that it is not to be discharged upon motion.

Motion denied, with costs.

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CASES IN CHANCERY.

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Long
v.
TARDY.

Sept. 9th.

**Long against MAJESTRE, administratrix, &c. and
TARDY.**

Though the 54th rule of the court, (*June, 1806*), where a *non-resident* files a bill, requires that security for costs should be filed; and if the solicitor for the plaintiff proceeds without filing security, he is liable for costs to the amount of 100 dollars; yet the court, if application for that purpose is made in due season, that is, before the answer is put in, or the first opportunity after the defendant knows of the fact of the non-residence of the plaintiff, will order all proceedings to be stayed, until adequate security for costs, that is, to a greater sum than 100 dollars, is filed by the plaintiff. In this case, the court ordered a bond, with surety, to be executed to the defendant, for 750 dollars, and filed with the register.

A RULE was granted, on the 13th of *August* last, to show cause why proceedings should not stay until adequate security for costs was filed; on the petition and affidavit of the defendants, that the plaintiff resided in the kingdom of *France*, and seeks, by his bill, an account of partnership transactions, alleged to have taken place partly in *Europe*, and partly in the *United States*. The answer of *Majestre*, the administratrix, had not yet been filed, and the other defendant had demurred to part of the bill.

Burr, for the defendants.

Harris, contra.

THE CHANLLOR. The 54th rule of this court, of *June*, 1806, requires security for costs, when a non-resident files a bill. The extent of that security, by the plaintiff, is not mentioned in the rule, and, of course, must be left to the discretion of the court. But if no such security be filed, and a solicitor prosecutes the suit, he is made responsible to the amount of 100 dollars, and no more. This does not, how-

ever, prevent the court, in cases requiring it, from ordering security in a greater sum than what the solicitor stands charged with. The old rule in the *English* court of chancery, where the plaintiff lived abroad, was 40*l.*; but Lord *Hardwicke* said it was too low, and the court frequently increased it upon terms; it did so in the case of *Gage v. Lady Stafford*, (2 *Ves.* 556.,) from 40*l.* to 300*l.* The defendant is not bound to accept of the solicitor's security under the rule. He is entitled to a sufficient freeholder. The solicitor is charged, in consequence of his omission, to see that his client files the sufficient security, and to provide, in all cases of non-residence, some indemnity for costs.

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W^W
LONG
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If, therefore, the defendant applies in season, he is entitled to adequate security for costs. The rule is, that he must apply before answer, and at the first opportunity, when the fact of non-residence appears upon the face of the bill; and if it does not, he must then apply as soon as the fact comes to his knowledge, which may be in any subsequent stage of the suit. (*Meliorucchy v. Meliorucchy*, 2 *Ves.* 24.)

I consider the application, in this case, in season, as to the defendant *Majestre*, but not as to the other; and, consequently, the suit, as to her, must be stayed, until a bond to her, with one sufficient person, to be approved of by the register or assistant register, in 750 dollars, be executed and filed.

Rule accordingly.

CASES IN CHANCERY.

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Mix
v.
Mix.

Sept. 13th.

Mix against Mix.

To give the court jurisdiction to decree a divorce, *a vinculo matrimonii*, on the ground of adultery, where the marriage was solemnized abroad, it must clearly and distinctly appear, from the bill, that both parties were inhabitants of the state at the time the adultery was committed.

THE plaintiff, on the 30th of April, 1814, filed a bill to obtain a divorce from her husband, on the ground of adultery.

The bill stated, that the plaintiff was a native of Great Britain, and now an inhabitant of this state. On the 9th of October, 1808, she married the defendant. The place of the marriage was not stated, but it was strongly to be inferred from the bill, that the marriage took place in England. The plaintiff stated, that she married the defendant, "a native and a citizen of the United States, and an inhabitant of the state of New-York." The defendant owed large debts in England, and, in June, 1809, they came to the United States. In January, 1810, they returned to England. In June, 1812, the defendant came back to the United States, with the pretence of finding employment. In January, 1813, he wrote to the plaintiff a letter, informing her that he was in the naval service of the United States; and she, in pursuance of a determination to follow her husband to the United States, embarked from England, in June, 1813, for New-York. She arrived at Boston, in July, 1813, and came to the city of New-York, and took lodgings. The defendant "shortly thereafter visited her, and after remaining and cohabiting with her two days, again abandoned her." That the defendant, since his arrival in the United States, hath committed adultery with S. H. and S. B., "of the city of New-York," in, or about, the month of February, 1814.

The defendant demurred to the bill, on two grounds :

1. That it did not appear that the plaintiff was within the provisions of the act ; and, 2d. That she does not state the offence, or act of adultery, with sufficient precision.

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Mrx

v.

Mrx.

Burr, for the plaintiff.

S. Jones, jun., contra.

THE CHANCELLOR. To give the court jurisdiction, in this case, it must appear that the parties were "inhabitants of this state at the time of committing the adultery." It does appear that the plaintiff (who is the injured party) was an actual resident; but that is not sufficient, as the marriage was not solemnized here. It must then appear, that *both parties* were inhabitants of this state at the time of the adultery charged; and this fact is not expressly averred, nor does it distinctly and certainly appear as to the defendant. The bill is not sufficiently clear and positive, on this point, to give the court jurisdiction. If this was the fact as to both parties, why not say so by a plain and positive averment? When the statute confines the jurisdiction of the court over divorces, to persons of a particular description, the bill ought to show distinctly that the parties come within that description. The more I examine the bill, the more uncertain it appears to me, whether the defendant really was an inhabitant of this state at the time of the adultery charged. It does not appear that he was born in this state. He is only stated to have been an inhabitant of it when he married, and then he was a non-resident, for the marriage was solemnized in *England*; and it does not appear that he was ever afterwards within this state, except when he visited his wife for two days, shortly after her arrival at *New-York*, in *July*, 1813. It appears that he owed large debts in *England*; that he remained there for eight months after the marriage, and then came to the *United States*; but it does not appear

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BRADWELLv.WEEKS.

to what part; that he returned to *England*, and resided there two years, and came again to the *United States*, (but the bill does not state where,) and entered into the naval service. The adultery is charged to have been committed with two woman of *New-York*, but is not alleged to have been committed in *New-York*. The bill is, therefore, destitute of certainty in this most material point, the defendant's domicil. The bill ought, therefore, strictly, to be dismissed, but as the objection does not touch the subject matter, or what may properly be called the merits of the case, and may have arisen from inattention in drawing the bill, I shall give the plaintiff leave to amend in twenty days, on payment of costs, and, in default thereof, that the bill be

**S. C. ante*, 108. dismissed.*

Ordered accordingly.



*Sept. 13. BRADWELL AND OTHERS, infants, &c. against WEEKS,
administrator of BRADWELL.*

An *alien enemy* may take *personal property*, by succession, as next of kin, and is entitled to a distributive share, under the act for the distribution of intestate estates; though he cannot recover it during a war, but it remains in the hands of the administrator, in *trust* for him, until the return of peace.

JOHN BRADWELL, the intestate, a native of *England*, died, at *Flushing*, in *Queen's county*, in *August*, 1812, intestate, without issue, leaving a widow, and a clear *personal estate*, after the payment of all debts, &c. of 6,219 dollars and 51 cents. *John* had four brothers, *Benjamin*, *Jonathan*, *Joseph* and *Peter*. He removed, with his brother *Benjamin*, from *England* to the *United States*, in 1802. *Benjamin* died a few years ago, in *New-York*, leav-

ing three sons, *Benjamin*, *William*, and *John*, the plaintiffs in this suit, natives of this state. *Jonathan* died in *England*, in 1802, leaving two children, who are still living there, named *Jonathan* and *Ann*; and the other brothers, *Joseph* and *Peter*, are, also, still living in *England*.

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In September, 1812, the defendant took out letters of administration on the estate of the intestate, and paid to the widow one moiety of the estate, and to *Gibbons*, the guardian of *William* and *John*, two of the sons of *Benjamin*, the brother of the intestate, deceased, 539 dollars and 30 cents, being two thirds of one fourth of the remaining moiety, and was ready to pay the other third of the one fourth, to any person authorized to receive it for the other son of *Benjamin*, who was an infant; but he retained in his hands, as he insisted he had a right to do, the remaining three fourths of the moiety of the estate, to be paid to the two brothers of the intestate, and the children of the deceased brother, who were in *England*, and who claimed their distributive shares as next of kin to the intestate.

The plaintiffs filed their bill, claiming the whole of the moiety of the estate, and insisting that *Joseph* and *Peter*, and the children of *Jonathan*, being *alien enemies*, were not entitled to any portion of the estate.

The cause was heard on the bill and answer.

Burr, for the plaintiffs.

Riggs, contra.

THE CHANCELLOR. The plaintiffs demand not only their equal portion, but the whole moiety of the personal estate of the intestate, to the exclusion of others who are next of kin, in equal degree, because they were alien enemies at the time of the intestate's death. The intestate died without issue, and the statute of distributions, in such case, directs that a moiety of the personal estate shall go to the widow, and the

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residue "shall be distributed, equally, to every of the next of kin of the intestate." The statute did not intend to limit the transmission of personal estate to such of the next of kin as were citizens, in imitation of the law of descents concerning real estate, but the personal estate was intended to pass to the next of kin, whoever, or wherever, they might be. The distinction between aliens and natives, as to the right of succession to chattels, does not exist. But it is urged that an alien enemy has no rights, and is incapable of acquiring any. This general proposition is not true, in the unqualified extent in which it has been laid down. By the modern law of nations, and by the law of the land, of which the law of nations is also a part, an alien enemy does not forfeit his rights of property. In many cases, he is entitled even to sue for his own rights, as when he is permitted to remain in the country, or is brought here as a prisoner of war, or when, perhaps, he is ordered out of the country in consequence of the war. He is recognised, in our courts, in his character of executor; (*Brocks v. Phillips, Cro. Eliz. 684.*;) and, in all cases, his property is protected and held in trust for him until the return of peace. This whole doctrine was examined and supported by authority, and admitted to be valid, in the cases of *Clarke v. Morey*, and of *Bell v. Chapman*, recently determined in the supreme court of this state. (10 *Johns. Rep.* 69. 183.) The policy of the law does undoubtedly place alien enemies under many disabilities, which, however, have been much diminished, or their severity mitigated, in modern times. As a general rule, alien enemies cannot sue in our courts while they are commorant abroad; and, perhaps, contracts between them and our citizens, made *flagrante bello*, may be illegal and void, unless when made under the sanction of public authority. But I am not aware that the existing laws go further. They impose no forfeiture or confiscation of property; they destroy no right, but only suspend the exercise of certain rights. It is for the sovereign power of the country to determine

when, and how far, in cases unprovided for by treaty, the rights and property of alien enemies shall be impaired by war. Without some special act of the government, an alien enemy is no otherwise affected, in his former capacity, as alien friend, to hold, acquire, and transmit, property, than in the cases to which I have alluded. If he should, by will, bequeath his goods and chattels in this state, or by deed, or writing, assign his *chores in action* to some alien friend, would not our courts give effect to those acts? But I come to the very point before me, and say that an alien enemy does not lose his capacity to take personal property, by succession, as next of kin. There is no instance in which such a disability has been declared. It would be repugnant to that spirit of mildness and moderation which now pervades the public law, as it is explained in the commercial codes, and in the writings of the most enlightened jurists. It is not within the reason, or the policy, of the rule of the common law, disabling aliens from taking real estate by descent; that disability, according to Sir *Matthew Hale*, (1 *Vent.* 417.,) is founded on this reason, that as the alien cannot keep the freehold, the law, *qua nihil frustra*, will not cast it upon him. But an alien enemy can keep, and does keep, his personal estate. All his goods, chattels, and credits, and all his civil capacities, as incident to personal property, are preserved to him, safe and untouched, until the return of peace. If the sovereign sequesters the alien's property, (as has sometimes been done, in time of war,) yet the very meaning of sequestration is a taking in trust, subject to restoration. (*Dig.* 16, 3, 6.) When peace returns, the rights of the alien revive in their original force; and, as a general rule, his debtor, whether that debtor be the public, or an individual, is answerable even for interest accrued during the season of hostility; for he has had, in the mean time, the enjoyment of the debt. If the debtor dies, or becomes bankrupt, his representative, in the character of executor, administrator, or assignee, holds the estate of the debtor, whatever it

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may be, in trust, for the payment of the alien's debt, as well as the debts of other creditors. An alien is one of the next of kin, within the words of the act, though he is an alien enemy; and the policy of the law is fully and effectually answered by disabling the alien from demanding, and drawing out of the country, his distributive share during the existence of the war; all that the laws of war require is, that we should not benefit the enemy. Any further disability would be a useless relic of ancient barbarity.

In the present case, the aliens are not attempting to recover the property. They are not before the court. We have only their relatives, in equal degree, who are unkindly seeking to exclude them from the rights and ties of kindred. If the property is forfeited, by reason of the war, it is forfeited to the government, not to the next of kin; and this court cannot interfere to enforce any disability, or penalty, which may be attempted to be deduced from the laws of war.

I shall, accordingly, let the portion due to the next of kin, who are abroad, remain in the hands of the administrator, to be retained by him, in trust, until those next of kin are in a condition to assert their claim, and to litigate, if necessary, with their relatives who are now before the court.

With respect to the share of the infant, *Benjamin*, the administrator may pay it into court, or retain it, at his election, until a guardian, duly appointed, shall be ready to receive it.

Bill dismissed, with costs.(a)

(a) This decree was reversed, on appeal to the court of errors, on the 27th of March, 1815. The members of the court of errors were equally divided in opinion; all the judges of the supreme court were for the affirmance of the decree, which was reversed by the casting voice of the President of the court, (Lieut. Gov. Tayler.)

1814.

HOFFMAN  
v.  
LIVINGSTON.

Sept. 19th.

*HOFFMAN against LIVINGSTON.*

Where a motion on some interlocutory matter in a cause, has been once heard and decided on, it cannot be repeated unless on a new ground. It is not enough that additional evidence is offered by the affidavits, of the matter urged in support of the former motion ; nor can affidavits be received on such motion to aid the answer of the defendants.

If the answer denies all the equity of the bill, the injunction to stay proceedings, at law, will be dissolved of course ; otherwise, it will be continued until the hearing : and where it may be necessary to ascertain any matter of fact, for the information of the court, it must be on an issue at law, awarded for that purpose.

*VAN VECHTEN*, for the defendant, moved to dissolve the injunction heretofore issued in this cause, so far as to suffer the defendant to go to trial for so much of the land in the plaintiff's possession as was not included in the farm, as possessed by *Hendrick Hoffman*, in *December, 1784*. He read the affidavits of *Simon Melius*, *Caleb Finch*, and *Robert Thompson*, a surveyor, to show that there was a considerable part of the land in the plaintiff's possession not included in the old farm.

*Henry*, contra, objected on the following grounds :

1. That a similar motion was made, and denied, the 6th of *August, 1810*.
2. That the defendant is not entitled to produce affidavits in addition to his answer, in support of such a motion.
3. That a permission to go to trial at law, and not by an issue under the direction of this court, is asked for in respect to a part of the subject matter in controversy.

**THE CHANCELLOR.** There is weight in all the objections. The same interlocutory motion, on the same matter, ought not to be repeated, without the existence of some new

1814. ground. The former motion, on the same point, was heard, discussed, and decided ; and there would be great vexation if the same motion can be repeated. But it is said that the affidavits present new matter. They are intended, however, only as additional evidence of the matter urged in support of the former motion ; nor is it usual or proper to introduce affidavits (taken, necessarily, *ex parte*) to aid the answer, on such a motion. The plaintiff is not permitted to traverse and contradict the answer by affidavits ; but the injunction is dissolved, of course, if the answer denies all the equity in the bill. If the answer is not sufficient, of itself, to support the motion, the injunction ought to be continued to the hearing.

When the court has jurisdiction of the case, and the answer is not sufficient to dissolve an injunction staying proceedings at law, there ought not to be a trial of any part of the matter in controversy, but such as shall be awarded for the information of this court. When it becomes necessary to ascertain what was the extent of the farm, as occupied by *Hendrick Hoffman*, in December, 1784, this court will take the proper measures for that purpose. The rights of the parties cannot be ascertained until the hearing, and, until then, it would be inconvenient, and might be dangerous, to permit any interference at law.

Motion denied, with costs.

1814.

 BUMPUS  
 v.  
 PLATNER.

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Sept. 29th.

**N. I. & S. BUMPUS against PLATNER, Bay, and UNDERWOOD.**

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Where A. conveyed land to B., by deed, with covenants of warranty, and B. executed to A. a bond and a mortgage, to secure the payment of part of the purchase money, B. cannot be relieved against the mortgage, on the ground of a failure of consideration, for want of title in A., possession having been taken by B., under the deed, and there being no eviction at law, under a paramount title; and, more especially, in a case where, the bond and mortgage having been assigned to C., B., in consideration of forbearance, executed a new bond and mortgage to C., for the same premises, will relief be denied against the assignee for a valuable consideration, without notice of any fraud, or failure of consideration, in the creation of the original debt. A purchaser, without notice, from one who has fraudulently purchased, is not affected by the fraud.

And a purchaser, with notice to himself, from one who purchased without notice of the fraud, may protect himself under the first purchaser.

THE bill, which was for an injunction, stated, that *Platner*, pretending to have a title to lot No. 28, in the *Freemason's Patent*, on the 30th of December, 1794, sold and conveyed it to *N. & I. Bumpus*, for 1,788 dollars, of which the sum of 100 dollars was paid down, and a bond and mortgage taken for the residue, since which the sum of 450 dollars had been paid on the bond. The deed contained the usual covenant of warranty. *N. & I. Bumpus*, afterwards, sold 100 acres of the land to *Simeon Bumpus*, the other plaintiff. The defendant, *Bay*, procured from *Platner* an assignment of the bond and mortgage, without any consideration; and then prevailed on the plaintiffs, *N. & I. Bumpus*, to execute a new bond and mortgage, on cancelling the old, for the balance due, 1,519 dollars and 87 cents, which were executed the 22d of June, 1799. The bill alleged, that, about that time, *Platner*, being suspected of forgery, was prosecuted for certain forgeries, and convicted and sentenced to the state prison; that the pretended deed from *Allen M. Dougall*, the

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v.  
PLATNER.

original grantee, to *Platner*, for the lot of land, was forged that one *Ebenezer Belknap*, and one *Seth Turner*, were concerned with *Platner* in his frauds and forgeries, which was well known to *Bay* at the time of his procuring the bond and mortgage, and he well knew the title to be suspicious. That *Bay*, in *February*, 1810, sold and assigned the bond and mortgage to the defendant, *Nathan Underwood*, who knew, at the time, that the pretended title of *Platner* to the land was false ; that *McDougall*, long before the pretended deed to *Platner*, had conveyed the lot to *John Weatherwax*, in pursuance of a trust, existing for that purpose, at the time of the grant ; that *Weatherwax* gave a mortgage of the premises to *Fountain* and others, in *England*, dated the 2d of *March*, 1773, who, afterwards, assigned the same to *John Thurman*, of this state, late deceased. The bill prayed an injunction against the proceedings of *Underwood*, on the bond and mortgage, &c.

The answer of *Platner* admitted the sale, &c., by him ; but he averred that *McDougall's* deed was genuine, and executed for a valuable consideration, and the title good ; that if he ever assigned the bond and mortgage to *Bay*, it was without consideration, and for the sole use of him, *Platner*.

*Bay*, in his answer, admitted the assignment from *Platner* ; and alleged that he gave *Seth Turner* the full amount of the bond and mortgage ; that he did not know that *Platner's* title was invalid. He took the assignment from *Platner* for greater security, believing that *Turner* was the owner of the bond and mortgage ; no consideration was paid to *Platner*, and the assignment was made while he was in gaol. The assignment from *Turner* was upon the sale to him of certain lands in the *Minisink Patent*, of which *Bay* was the owner ; and he was told, and believed, that *Platner* authorized *Turner* to sell the bond and mortgage ; and when *Platner* made the assignment, he did not pretend that the sale by *Turner*, to him, was without authority. He heard

of *Platner* being prosecuted for forgery, about 6 months before the assignment by *Platner* to him.

*Underwood*, in his answer, admitted the sale and assignment of the bond and mortgage, to him, by *Bay*, on the 27th of *February*, 1810, but said it was for a fair and valuable consideration. He said that he had no knowledge to induce a belief that the deed to *Platner* was forged; that the possession of the plaintiffs and others had been held for twenty years, and were now held under that deed, or the title of *Platner*; that he was induced to purchase the bond and mortgage, from the advice of counsel that *Thurman's* claim was groundless.

*Elijah Snow*, a witness, deposed, that, in 1793, he was at the house of *Platner*, and told him that the occupants on the *Freemasons'* patent wished to discover the owners. *Planter* said he did not know that he ever had any concern with the lands in that patent, but would endeavour to find out the owner. Afterwards, in the same year, the witness again saw *Platner*, who said he knew all about it, and produced *M'Dougall's* deed. The witness informed the plaintiffs, and other settlers, of these circumstances, and the plaintiffs went and purchased of *Platner*. That *Platner* told him, about 10 years ago, that *Bay* had got the bond and mortgage without his consent, and without consideration. The witness saw *Bay*, 14 or 15 years before, in *Herkimer* county, when he said that he had come up to get the bond and mortgage exchanged, and, for that purpose, would give a longer time of payment. The witness suggested to him a suspicion that the deed to *Platner* was forged, having heard that *Platner* was lately convicted of forgery, and *Bay* answered, that it looked rather suspicious. *Bay* told the plaintiffs, that he had got the bond and mortgage for a debt *Platner* owed him, and offered them further time of payment, to change the bond and mortgage. About that time he communicated to the defendant, *Underwood*, all

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1814. the suspicious circumstances above mentioned, relative to *Platner's* deed.

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Another witness stated, that he heard *Platner*, in 1796, or 1797, tell *I. Bumpus*, one of the plaintiffs, that the title from *McDougall* was good; and that, in 1798, or 1799, *Bay* said the same to the plaintiffs, and that he had purchased the bond and mortgage of *Platner* for a valuable consideration, and applied to the plaintiffs to change them.

It was proved, also, that *Platner* had declared, within 3 or 4 years, that his title from *McDougall* was good, and that *Bay* had got the bond and mortgage from him, when in trouble, for nothing; that *Bay*, at that time, said he had sold his bond and mortgage to *Underwood*, at a discount, to be collected at his own risk.

It was further proved, that in 1803, ejectment suits were brought by *Thurman* against the plaintiffs, and that the counsel informed them that the deed to *Platner* was a forgery, and advised them not to produce it. After one trial, in which the defendants succeeded, on the ground of a presumption of payment, a compromise took place.

On the part of the defendants, it was proved, that the plaintiffs had lived on the premises for more than 20 years, and the witness always understood that they held possession under *Platner's* title; that no other title was ever mentioned, except that of *Thurman's*, who failed in his ejectment, in 1803.

William Bay testified, that the bond and mortgage were taken by his father, (one of the defendants,) on a contract for the exchange of lands with *Turner*; his father letting *Turner* have lands in the *Minisink* patent for land in *Esperanza*.

The plaintiffs exhibited a deed from *McDougall* to *Weatherwax*, in 1771, and the mortgage from *Weatherwax*, in 1773.

Gold, for the plaintiffs.

Kirkland, contra.

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THE CHANCELLOR. I have not been able to discover any principle arising out of the facts, in this case, that will enable me to set aside the bond and mortgage given by the plaintiffs to the defendant, *Bay*. The ground taken in support of the bill, is the failure of consideration : 1. Because the title, derived from *Platner*, was founded on a forged deed from *McDougall* to *Platner* : 2. If not, yet that there was a prior conveyance from *McDougall* to *Weathervax*.

1. The allegation of forgery is not proved, and, probably, would never have been made, if *Platner* had not been convicted of some other forgery, in 1799, and which was several years after he had sold to the plaintiffs. But we are not authorized to declare the deed a forgery, on mere suspicion, nor because *Platner* was convicted of forgery, in another case, totally unconnected with this. The deed appears to have been proved before a master, by a subscribing witness, in 1797, or two years before the plaintiffs contracted with *Bay*. They purchased with knowledge of several circumstances, now put forward as grounds of suspicion ; for those circumstances were known to *Elijah Snow*, in 1793, and by him told to the plaintiffs, before they took their deed of *Platner*, in December, 1794. When the bond and mortgage, originally given to *Platner*, were given up and cancelled, in 1799, and a new bond and mortgage (being the same now in question) executed to *Bay*, he appears to have been the assignee of the original bond and mortgage, without the knowledge of any fact to impeach them, and to have purchased them for a valuable consideration. There is no such knowledge brought home to him by any proof in the case. He alleges, in his answer, that he purchased the bond and mortgage, *bona fide*, and for a valuable consideration ; and his averment must be taken for truth, until it is duly disproved. The consideration is supported by the deposition of *William Bay*, and the fact is not contradicted.

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The bond and mortgage were renewed upon his giving further time of payment, and there does not appear to have been any undue practice in procuring them. If the assignment from *Platner*, or his agent, was unduly procured, it is a question to be settled between *Platner* and *Bay*, in the present suit, not between *Bay* and the plaintiffs.

2. The failure of consideration, because *McDougall* had no title when he conveyed to *Platner*, does not appear to be sufficiently ascertained. It is said to be very difficult to extract from the books, what the rule of equity is upon this point of failure of consideration, after the agreement is executed; (1 *Fonb.* 363. ;) but, I apprehend, it may be safely said, that there is no case of relief on this ground, when possession has passed and continued, without any eviction at law, under a paramount title. *Platner* conveyed to the plaintiffs, with a covenant of warranty, and he is bound to defend their title at law; and *non constat*, that he is not able and willing to do it. There was a case under *Lord Nottingham*, (2 *Ch. Cas.* 19. *Anon.*) in which the purchaser was relieved from the payment of the purchase money; but he had already lost the land, by eviction, under a better title. If the title fails, in this case, the plaintiffs can resort to the covenants in their deeds for their indemnity. I consider an eviction at law an indispensable part of the plaintiffs' claim to relief here, on the mere ground of failure of consideration. The proof is, that they have been in possession of the land ever since the purchase from *Platner*, (and which was near twenty years ago,) under that title, and no other. It would appear, indeed, from exhibits in the cause, that *McDougall*, under whom *Platner* claimed, had previously sold to one *Weatherwax*, whose estate was afterwards forfeited to the people of this state. That may be the better title, but it cannot be tried here upon this bill. The people are no party to this suit, and the presumption is ripening fast against that title, from the lapse of time since it accrued,

which was during the revolutionary war. It is impossible for me to know what legal, or what valid, defence may be set up against it. Perhaps there may be none, but the present application is clearly premature ; and it would be without precedent, and dangerous in principle, to arrest and bar the recovery of the debt, while the purchaser is still in possession under the purchase deed, and there has been no eviction at law.

There is another, and a very strong ingredient, in this case, that forbids relief. I allude to the fact, that several years after the purchase from *Platner*, and enjoyment of the land, the plaintiffs took up the original bond and mortgage, and gave new ones to *Bay*, the assignee, in consideration, of forbearance. He stands in the light of an assignee for a valuable consideration, without notice of any fraud, or want of consideration, in the original creation of the debt. He has, therefore, strong claims against the interference of the court against him. Such purchasers are especially protected in their subsequent contracts. Thus, where *A.* gave a usurious note to *B.*, who sold it to *C.*, for a valuable consideration, without notice of the usury, and *A.* took up the note, and gave a bond to *C.* for the amount, it was held good. The substituted security was not liable to the charge of usury, which vitiates the original security. (*Cuthbert v. Haley*, 8 *Term Rep.* 390.) On the same principle, a purchaser, without notice from a fraudulent purchaser, is not affected by the fraud. (*Jackson v. Henry*, 10 *Johns. Rep.* 185.) The maxim, in these cases, is, *in jure non remota causa sed proxima spectatur*.

I have considered this case, all along, as if *Bay* was still owner of the bond and mortgage, and have not deemed it material to examine, as to any notice with which *Underwood*, the present holder of the securities, might be charged. It is a well-settled rule of this court, that a man who is a purchaser, with notice himself, from a person who bought without notice, may protect himself under the first purchaser.

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1814. The reason is, to prevent a stagnation of property, and because the first purchaser being entitled to hold and enjoy, must be equally entitled to sell. (*Lowther v. Carleton, Cases temp. Talbot*, 187. 2 Atk. 139. 242. *Harrison v. Forth, Prec. in Ch.* 51. *Brandlyn v. Ord*, 1 Atk. 571. *Mertins v. Jolliffe, Amb.* 313. *Sweet v. Southcote, 2 Bro.* 66.)

I am, accordingly, of opinion, that the bill, as to all the defendants, must be dismissed, with costs.

Bill dismissed.

Oct. 3d.

ROOSEVELT AND OTHERS against THURMAN.

THURMAN against ROOSEVELT AND OTHERS.

Where a cause is referred, by consent of parties, under an order of court, and the referees, who were two lawyers and a merchant, were to decide all questions in dispute between the parties, as well matters of law as of fact; and a question of law, as to a will, put in issue by the pleadings, and discussed before the referees, was decided by them; it seems this court will not interfere with the award, unless a gross and palpable mistake is shown.

The words of a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would arise from such construction.

T, by his last will, after giving to his nephews, R., N., S., &c., each 1,000 pounds, as they came of age, devised two houses and lots, "with every right agreeable to the deeds of the same," to R., to be delivered to him as soon as he came to the age of 21 years; and if he died "before he came to age and without male issue," he devised the same to N., "to be delivered to him as soon as he comes to the age of 21 years." "The first possessor, as soon as his first male child shall come to the age of 21 years, it is my will that the right of the said houses be to him, his heirs and assigns, for ever; but not to be disposed of before his eldest son comes to age;" whoever gets the houses, to have no claim to the 1,000 pounds, before left him, but his share to be equally divided with the other legatees. R. arrived at the age of 21 years, but had no issue.

It was held that, by the words "dying without male issue," *R.* took an estate tail, by the *English* law, or an estate in fee under our statute; that the fee vested in *R.*, on his attaining the age of 21 years or having male issue, either event being sufficient for that purpose.

That the clause, that the first taker was not to dispose of the estate before his eldest son came of age, did not engraft an executory devise on the preceding fee, but was intended by the testator as a temporary restriction on the power of alienation, and being repugnant to the nature of the estate, was void.

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THE plaintiffs, *Nicholas Roosevelt*, and *Elizabeth Gilchrist*, wife of *Robert Gilchrist*, and the defendant, *Thurman*, are the nephews and niece of *John Thurman*, deceased, and his only surviving devisees and heirs at law; and the defendant is the only surviving executor of the last will and testament of *John Thurman*, who died in 1809. His will was dated in 1769.

These were original and cross suits. The bill, in the first cause, was filed against the executor for an account as to his administration of the estate; to settle some questions of law arising on the will; and to obtain a discovery as to the title deeds, and the estate of which the testator died seized.

The cross bill was to obtain a discovery, from the defendants, of the state of their accounts with the testator; and for a settlement thereof, which it appeared had been accomplished.

By his will, the testator devised as follows: "I give to each of my brothers' and sisters' children, *John*, *Ralph*, *Lucretia*, and *Elizabeth*; to my sister *Elizabeth*, her children, *Nicholas* and *Elizabeth*; to my sister *Letty*, her son, *Samuel*; to each of those children above named, as they come of age, 1,000 pounds; but should my estate, exclusive of the fast estate hereinafter named, not be sufficient to pay those legacies, they are to receive an equal portion of whatever their share shall be, share and share alike; should any of them die before they come of age, that share is to be equally divided among the survivors. I give the

1814. corner house I now live in, to my brother *Francis'* son,
~~ROOSEVELT~~ my nephew *RICHARDSON*; also, the house next door, where
~~v.~~ *Joseph Cox* now lives, together with the ground, and every
~~THURMAN.~~ other building on the said corner lot, and the lot next it.
adjoining Mr. *Dunscomb's*, whereon the house stands where-
in Mr. *Cox* lives, with every right, agreeable to the deeds
of the same, to be given him as soon as he comes to the age
of 21 years; but should *Richardson* die before he comes
to age, *and* without male issue, I give as before described,
the two lots and buildings to my brother *Ralph*, his son,
Ralph, my nephew, to be delivered to him as soon as he
comes to the age of 21 years. If both die before they come
to age, *and* without male issue, I give it to my nephew,
JOHN, *Ralph*'s son. If all die before age, *and* without male
issue, I give it, as before described, to my sister's son,
Nicholas Roosevelt, to be delivered to him as soon as he
comes to the age of 21 years. The first possessor, as soon
as his first male child shall come to the age of 21 years,
it is my will that the right of the said houses be to him, his
heirs and assigns, for ever, but not to be disposed of by
him before his eldest son comes of age." "Whoever gets the
houses, to have no claim to the thousand pounds before left
him, but his share to be equally divided among the surviving
children before mentioned. The residue and remainder of
my estate, whether real or personal, to be equally divided
among my brothers' and sisters' children, to be paid them
as they come of age."

RICHARDSON and *JOHN* both died in the lifetime of the
testator. *RALPH*, the next devisee over, entered, and took
possession, on the death of the testator; he is advanced in
years, and has had no male issue.

Thurman, in his bill, among other things, charged that
he was the person described in the will of the testator, as
Ralph, his nephew, son of his brother *Ralph*; and that, by
the death of *Richardson*, and by virtue of the said will, &c.,
he was entitled to an estate of inheritance in fee simple, abso-
lute, of and in the two houses in the said will mentioned.

The causes were referred, under an order of this court; and, on the 14th of *January* last, the referees made a report, to part of which exceptions were taken by the plaintiffs in the first suit:

1st. That the referees, although the question could not fairly arise until the death of *Ralph Thurman*, the defendant, without male issue, who should attain the age of twenty-one years, have decided that he took an absolute estate, in fee, in the premises; and that, if that question could arise, it was decided, by the referees, incorrectly.

The 2d, 3d, and 4th exceptions were, that the referees make no award respecting sundry debts due to the testator, and divers bank shares and cattle which belonged to the testator, and are enumerated in the schedule annexed to the answer of the defendant to the original bill, and which matters, it was contended, were submitted to the referees for their determination, under the order of reference.

The last exception was, that the referees had made no award as to the disposal of any personal property of the testator, not enumerated in the schedules annexed to the answer, which might, after filing the answer, come to the knowledge of the executor; whereas they ought to have awarded and directed that the same should be duly collected, and from time to time accounted for, by the executor, according to the will of the testator.

Harrison and Robinson, in support of the exceptions.

Riggs, contra.

For the *plaintiffs*, it was contended, that the intention of the testator was to govern in the construction of the will, and that, to discover that intention, the whole will must be taken together. (2 *Bl. Com.* 381. n. 13. 1 *Vesey*, 169. 1 *Vesey*, jun. 268. 270. 2 *Vesey*, jun. 105.)

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That if the will had stopped at the words "if he die before he come of age, and without male issue," it must be admitted that *Ralph* would take an estate tail under the English law, or an estate in fee under our statute; but this was restricted by the subsequent clause, limiting the estate on condition that *his first son comes of age*. This clause manifestly showed, that the testator intended that the estate should go over to his nephew, *Nicholas Roosevelt*, unless *Ralph* had a son who arrived at full age. (*Cro. Eliz.* 525. *Talbot's Cas.* 44. 1 *Bro.* 147.) This restriction is not to be rejected as repugnant to the will, for it is perfectly consistent with it; and it was intended for the benefit of *Roosevelt*. To support this intention of the testator, the word "and" is to be read *or*. (*Talbot's Cas.* 44. 3 *Atk.* 283. 4 *Vesey*, 311. 227. 3 *Vesey*, 103 8. *Viner*, 181. pl. 7. 182, pl. 11, 12, 15, 16. 186, pl. 51. 1 *P. Wms.* 54. n. 1.) If the word "and" is not construed disjunctively, the intention of the testator, that the first taker should arrive at the age of 21 years, without regard to his issue, and the provisions of the will, would be defeated.

For the defendant, it was insisted, that, as the question now raised was put at issue by the pleadings, and was left to the decision of the referees, by the order of reference entered by the consent of the parties, it was now too late to object that the decision of the question was premature, after it had been argued and discussed before the referees.

That all the other exceptions are not founded on any thing now before the court, and no objections on those points were made before the referees; and it was, therefore, too late and irregular to raise them here. The defendant, however, was willing that all assets that should come into the defendant's hands, subsequently to his answer, should be duly accounted for in the course of administration; and the counsel for the plaintiffs expressed themselves satisfied that a saving to that effect should be inserted in the decree.

As to the construction of the will, it is said, that *Ralph* was to have an estate in fee, if he attained the age of 21 years, or had male issue ; and that, if he had such issue, he could not sell until his son was of age. A legacy of 1,000 pounds is devised to him, and is not that to be disposed of until after his death ? It is admitted that he had a life estate ? Is he, then, to lose the legacy, and get only a life estate ? *Roosevelt* is to have half of that legacy, and yet claims the fee after his death. Such was not the intention of the testator. He meant, undoubtedly, that the whole of his estate should be settled when the devisees came of age. The word "and" is not to be read or, to carry the estate over ; the words create an estate in fee, or an estate in tail, in *Ralph*. An estate tail arises by implication, where the devise over is to the blood of the devisor, not where it is to a stranger. (*Talbot's Cases*, 1. 2 Vern. 324. 766. 8 *Vin. Devise.* 1 P. Wms. 605. *Resol.* 4. 1 *Aik.* 432. 2 *Vesey*, 243. 247, 248. *Ambl.* 355. 358. 385. 4 *Term Rep.* 82. 5 *Term Rep.* 335.) The court will carry a general intent into effect, though it may defeat a particular intent. (*Whitebread v. St. John*, 10 *Ves.* 152—154.)

The restriction in the latter clause, is repugnant to the estate, before given in the former parts of the will, and a restraint upon alienation, and ought to be rejected as void.

THE CHANCELLOR. The last exception taken to the report was disposed of by arrangement between the counsel. It was agreed, on the part of the defendant, *Thurman*, that the decree should contain a provision, that the assets which might subsequently come to the hands of the defendant, as executor, should be duly accounted for in the course of administration, and this was all the security required on the part of the plaintiffs. As to the 2d, 3d, and 4th exceptions, they relate to some small matters of account said to have been omitted by the referees ; and there is nothing before

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the court to enable me to judge of the truth and force of these exceptions. The objection to any such alleged omissions, ought to have been made to the referees on the making up of their report. There remains for consideration the first, and which was the only material exception taken.

This exception is, that the referees have determined that the defendant, *Thurman*, is entitled to an estate in fee in the two houses and lots mentioned in the report, whereas, they were not called on to decide this point, and, if they were, they ought to have decided it differently.

It was suggested upon the argument, and, I think, not denied, that this point of law was raised, and discussed on both sides, before the referees. If this be so, it is now too late for the plaintiff to object to the jurisdiction of the referees over the question ; and it appears to have been a point put in issue by the pleadings, and proper for the consideration of the referees under the submission. By the original bill, the defendant, *Thurman*, was called on, as executor, to account, among other things, for the rents and profits of the real estate whereof his testator died seized ; and, by the answer, he sets up an absolute title in himself in fee, under the will, to the two lots which are the subject of discussion, and denies that he is accountable for the rents and profits of them. The reference was made, by consent, to one merchant and two gentlemen of the bar, with directions to state an account, and to decide on all questions in dispute between the parties, "as well matters of law as of fact." I have no doubt, therefore, that the question of law, on the title of *Thurman* to the two houses and lots in *New-York*, was in issue, and properly embraced by the submission.

After the parties have chosen to submit a point of law to gentleman of the profession, it may be doubted whether the court ought to permit the discussion to be renewed here, without showing a case of gross and palpable mistake. In this case, however, a reservation appears in the rule of submission, by which the report was declared to be liable to

exceptions by either party, as a master's report would be. This reservation may have been intended to be confined to that part of the submission which was the ordinary subject of reference to a master, and this is, perhaps, the better construction of the rule. But I do not wish to construe the rule rigorously, in this case, nor to deprive the parties of a resort to the opinion of the court on the question of law arising upon the will; and I shall only observe, that *after such a reference as the one before us*, the objection should be supported upon pretty clear and solid grounds.

As *Richardson*, the first devisee, and *John*, a devisee named subsequent to the defendant, died in the lifetime of the testator, their names may be considered as struck out of the will. The devise then is of the two houses and lots, "with every right agreeable to the deeds of the same, to be delivered to the defendant as soon as he comes to the age of 21 years; and if he dies before he comes to age, and without male issue," than the devise over was to his nephew, the plaintiff, *Roosevelt*.

If the will had stopped here, it seems to be conceded that the defendant would have taken an estate in fee, or an estate tail, under the *English* law, which by our statutes is now turned into an estate in fee.

The construction is plausible, that by the devise of the lots, "with every right" belonging thereto, under the deeds, the whole interest of the testator therein passed. He gives the houses with the ground, and every other building, and every right, agreeable to the deeds. The words are not free from ambiguity; if he meant by them only a description of his estate, and not of his entire interest therein, yet the limitation of "dying without male issue" made it an estate tail. This construction of those words appears to be well settled. (*Whiting v. Wilkins*, 1 *Bulst.* 219. 8 *Viner*, 211. pl. 11. 4th *Resolution*, in 1 *P. Wms.* 605. 2 *Bro.* 558. 578. *Doe v. Applin*, 4 *Term Rep.* 82. *Denn v. Slater*, 5 *Term Rep.* 335. *Stanley v. Leonard*, *Amb.* 355.) The fee

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vested on his attaining the age of 21, or having male issue. Either event was sufficient; for the word *and*, in the devise, is not here to be read *or*, but is to be taken in its natural and grammatical sense. The case of *Doe v. Jessep*, (12 *East*, 288.) is to this very point; and it was there held, that the words in a will are to be construed according to their natural sense, unless some obvious inconvenience, or incongruity, would result from so construing them. Why should we, as Lord *Ellenborough* observed, read *or* for *and*, and give the estate over, upon the happening of one only of the events, when no inconvenience would ensue by construing the word in its natural sense. In the case referred to, the devise was to a natural son; "and if he die before 21, and without issue," then to the testator's father and the mother of the son; and, on a different construction, if the son had happened to die before 21, leaving issue, that issue could not have taken. So here, if *Thurman* had died under age, and had left issue, the reading the word *and* as *or*, would have disinherited that issue as to the devise, and this could hardly have been the testator's meaning. To prevent such a result, the courts have frequently reversed the rule by turning *or* into *and*. (2 *Ves.* 249.)

But the principal difficulty has arisen from the subsequent part of the will, in which it is declared that "the first possessor, as soon as his first male child should come of age, it is my will that the right of the said houses be to him, his heirs and assigns, but not to be disposed of by him before his eldest son comes of age." It is contended, on the part of the plaintiffs, that here is an executory devise engrafted on the preceding fee; and, on the part of the defendant, that it is only a temporary restriction intended by the testator upon the power of alienation, and that the restriction is so far void as being repugnant to the nature of the estate. It appears to me, on an examination of the will, that the latter is the sounder construction. The limitation over, to *Roosevelt*, is upon the event of the defendant's dying

under age, and without male issue. There is no provision for the remainder over, on the event of the first male child dying under age, and the omission shows that the testator could not have had in contemplation the case of a limitation over, except upon the event of the nephew himself dying under age and without such issue. The will also directs, that "whoever gets the houses" shall have no claim to the 1,000*l.* legacy, but his share shall go to the other relations; and, as the defendant takes the houses upon either construction, he loses his legacy. It is not probable, when we recur to the known value of such a pecuniary legacy, at so early a period as the date of the will, that the testator intended that any estate in those two houses, short of a fee, should be a substitute for it. If we compare the several provisions in the will, it seems to have been the testator's general design, that all the legacies and grants should vest at the age of 21. Thus, the pecuniary legacies of 1,000*l.* are to be paid as the legatees respectively come of age, and these very lots are to be given to the devisee (and three were named in succession) when he comes of age. So the limitation over is to vest when the plaintiff is of age; and all the residue of the estate, real and personal, is to be divided, and paid to the residuary legatees at the same period. The existence of an executory devise, in this case, is not, then, in furtherance of the uniformly-declared intentions and policy of the will. The idea of an executory devise is, where the testator gives absolutely to one, and, upon the happening of an event gives the same estate to another. But here is no designation of the person who is to take, by way of executory devise, if the defendant should die without any male child being of age. It is not the plaintiff, *Roosevelt*, for the event had long before happened, and must have happened, upon which the limitation to him was determined; and he has, in consideration thereof, his share (being here a moiety) of the legacy, which the defendant lost on taking the estate. In short, the general scope or design of the will was to fix and

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bounty came of age ; and this last strange and perplexed pro-
vision was not intended in favour of *Roosevelt*, (for it has no
allusion to him,) but it seems to have been meant as a check
to an improvident waste, or alienation of the estate, by
the defendant, during the early part of his life ; and being
an intention inconsistent with the rules of law, it must be re-
jected.

I am, accordingly, of opinion, that the exceptions be over-
ruled, and with costs, as to all, except the last ; and that the
report be confirmed, with a provision in the decree as to
future assets.

Decree accordingly. (a)

(a) Vide *Campbell v. Thewliss*, (1 Price's Excheg. Rep. 81.) where the
court of exchequer, in England, refused to interfere with the award of a bar-
rister at law, to whom the cause had been referred, both as to law and fact,
though the point of law decided by him was, at least, doubtful.

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**MANN AND OTHERS against THE EXECUTORS OF MANN
AND OTHERS.**

Parol evidence is inadmissible to supply or contradict, enlarge or vary, the words of a will, or to explain the intention of the testator, except there is a latent ambiguity arising *dehors* the will, as to the person or subject-meant to be described ; or to rebut a *resulting trust*.

Where the testator bequeathed to his wife *all the rest, residue, and remainder of the moneys belonging to his estate, at the time of his decease*, it was held that the word *moneys* must be understood, in its legal and popular sense, to mean *gold or silver*, or the lawful currency of the country, or *bank notes*, where they are known and used in the market as cash, or money deposited in bank, for safe keeping ; and not to comprehend *promissory notes, bonds, and mortgages, or other securities* ; there being nothing in the will, itself, to show that the testator intended to use the word in that extended sense.

THE plaintiffs, as heirs and residuary legatees of *David Mann*, deceased, filed their bill against the widow and executors. The testator, by his will, dated *March 9, 1802*, after directing his debts to be paid, and a legacy to his niece, *Mary Connel*, to be paid out of his personal estate, devised to his wife, and to her heirs and assigns for ever, in fee, certain lands and real estate, therein described ; and, also, bequeathed to her *all the rest, residue, and remainder of the moneys belonging to his estate at the time of his decease* ; and, also, his negro slaves, horses, stock, furniture, &c., declaring that what he gave to her should be in lieu and bar of her dower ; and exonerated his brother, *Michael*, from the payment of all moneys which he should owe to the testator at the time of the testator's decease ; and gave to his niece, *Mary Holford*, 500 dollars, to be paid out of the moneys arising from the sale of the residue of his real estate. The testator also devised to the children of his brother, *Michael*, and his daughter, *Mary*, and to the children of his brothers, *George* and *Matthias*, and their heirs, &c., "*all the rest, residue, and remainder of his estates, real and personal, or*

1814. *the moneys arising from the sale thereof, equally to be divided between them, share and share alike."* And he empowered his executors to sell the residue of his real estate, &c.; and appointed his wife executrix, *Daniel D. Tompkins, Esq.* *Henry Brevoort, Esq., and James Berian,* executors of his will. The bill further stated, that the testator was seized in fee of divers others lands, beside those devised to his wife; and died so seized, in *July, 1811*, and possessed of a considerable personal estate, over and above the moneys belonging to him, and beside the articles bequeathed to his wife, and the money due from his brother, *Michael*, viz. bonds, mortgages, and other securities, and outstanding debts. That the executors have possessed themselves of the personal estate of the testator, and have taken the rents of the real estate before the sale thereof, and of the other parts of the real estate not sold. The plaintiffs prayed for a discovery and account of the personal estate, and of the rents and profits of the real estate, and particularly of the outstanding debts due to the testator at the time of his decease.

The defendants, in their answer, admitted the facts stated in the bill, and made the discovery called for. They stated that they had sold all the real estate, except the land specifically devised, and had divided the proceeds according to the directions of the will; that the personal property, exclusive of money, choses in action, and the specific legacies, amounted to 1,968 dollars; that the testator left in *cash*, 500 dollars, and in *bonds, mortgages and notes*, to the amount of 13,735 dollars and 80 cents; and that, not only all the money, but all the bonds and securities, had been allowed to be retained by the widow of the testator, the executors supposing that they passed to her, under the clause in the will, devising to her "all the rest and residue of the moneys belonging to the testator's estate." And this presented the only point in the cause, namely, whether the widow is entitled to the securities, under the will, or whe-

ther they do not go, as part of the residue of the estate, to the plaintiff.

Several witnesses were examined on the part of the defendants, to show the intention of the testator.

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Harrison and *Robinson*, for the plaintiffs, contended, 1. That parol evidence was inadmissible to explain the meaning of the testator, and ought to be suppressed ; and, to this point, they cited *Talbot's Cases*, 240. *Brown v. Selwyn*, and n. 2 *Freeman's Rep.* 62. *Str. Rep.* 1260. 2 *Vesey*, 217. 4 *Vesey*, 616. 2 *P. Wms.* 420. 3 *P. Wms.* 51. 353. 4 *Bro. P. C.* 180. (old edit.) 1 *Atk.* 558. 2 *Atk.* 373.

2. That the word "moneys" does not include *chooses in action*; and to this point were cited 1 *P. Wms.* 575. 579. 1 *Eq. Cas. Abr.* 201. 2 *Vernon*, 688. 747. *Ambler*, 641. *Bac. Abr.* tit. *Legacy*, (B. 3.) 1 *Vesey*, 187. 273. 3 *Atk.* 232.

T. A. Emmet, contra, insisted, that the words, "rest and residue of the moneys belonging to the estate," meant something more than the *cash* in hand at the time of the testator's death; that it had been decided in *England*, that *bank notes*, in the desk of the testator, would pass as *money*, and that was a step gained, for they are *chooses in action*; and that *money in bank* was held to be included under a bequest of *money*, which was another step gained in favour of the construction given by the defendants to the will.

THE CHANCELLOR. The question here is, whether, under the bequest of "all the rest, residue, and remainder of the *moneys* belonging to my estate at the time of my decease," the widow be entitled to any thing more than the cash which the testator left at his death; or whether, as the defendants have contended, she be entitled also to the bonds, mortgages, and notes?

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This question has led to another, and that is, whether the parol evidence offered be admissible to explain the testator's meaning?

It is a well-settled rule, that seems not to stand in need of much proof, or illustration, for it runs through all the books, from *Cheney's Cases* (5 Co. 68.) down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases; 1. Where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and, 2. To rebut a resulting trust. All the cases profess to proceed on one or the other of those grounds. (*Hodgson v. Hodgson, Prec. in Chan.* 229. 2 Vern. 593. *Pendleton v. Grant*, 2 Vern. 517. *Harris v. Bishop of Lincoln*, 2 P. Wms. 135. *Beaumont v. Fell*, 2 P. Wms. 140. *Hampshire v. Pierce*, 2 Ves. 216. *Urich v. Litchfield*, 2 Atk. 372. *Lord Walpole v. Lord Cholmondeley*, 7 Term Rep. 138. *Lord Eldon*, in *Druce v. Denison*, 6 Ves. 397.) If there be a mistake in the name of the legatee, or there be two legatees of the same name, or if the testator bequeath a particular chattel, and there be two or more of the same description, or if, from any other misdescription of the estate, or of the person, there arises a latent ambiguity, it may and must be explained by parol proof, or the will would fall to the ground for uncertainty. When a latent ambiguity is produced, according to the language of the courts, (*Lord Thurlow*, in 1 Ves. jun. 259, 260. 415., and *Lord Kenyon*, in 7 Term Rep. 148,) in the only way in which it can be produced, viz. by parol proof, it must be dissolved in the same way; and there is no case for admitting parol evidence to show the intention upon a latent ambiguity on the face of the will. They are all cases of latent ambiguity; and the objection to supply the imperfection of a written will, by the testimony of witnesses, is founded on the soundest principles of law and policy. "It would be full of great inconvenience," say the justices, in *Cheyney's*

case, "that none should know, by the written words of a will, what construction to make, or advice to give, but that it should be controlled by collateral averments out of the will." And if collateral averments be admitted, to use the words of Sir *Matthew Hale*, in *Fry and wife v. Porter*, (1 Mod. 310.,) "how can there be any certainty? a will may be any thing, every thing, nothing. The statute appointed the will to be in writing, to make a certainty; and shall we admit collateral averments and proofs, and make it utterly uncertain?" In a still later case, (3 P. Wms. 354.,) Lord *Talbot* observed, that if we admit parol proof, "then the witnesses, and not the testator, would make the will;" and he spoke with equal decision in the case of *Brown v. Selwyn*, (*Cases temp. Talbot*, 240.,) though the parol proof, in that case, would have left no doubt of the intention of the testator being contrary to the legal operation of the will. This case comes with the more weight since the decree was affirmed in the House of Lords, (4 Bro. P. C. 179.,) who would not suffer the parol evidence to be read, nor even the answer as to that matter.

Perhaps a solitary *dictum* may, occasionally, be met with (for there are volumes of cases on the subject of wills, *immensus aliarum super alias cumulus*) in favour of the admission of parol proof, to explain an ambiguity of uncertainty appearing on the face of a will; though Lord *Thurlow* says, there is no such case. If there be, we may venture to say, it is no authority. If a will be uncertain, or unintelligible on its face, it is as if no will had been made; *quod voluit non dixit*. We ought not to forget, that no verbal or nuncupative will is good, within the statute of frauds, except under special circumstances; and that no will concerning any personal estate (and of that we are now speaking) shall be revoked, or altered, by any words, or will, by word of mouth only. (*Laws*, sess. 36. ch. 23. sect. 14, 15, 16.) The only apology for parol proof, in any case, is the necessity of the thing, because the ambiguity is

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so complete as to elude all interpretation, and would destroy the devise altogether, unless explained. But here is no such difficulty, and no such necessity for resorting to parol proof. The word *moneys* will apply, beyond all doubt, to the cash which the testator left at his death ; and the bequest has, at all events, a certain and definite subject on which it can operate. In the late case of *Doe v. Oxenden*, (3 *Taunt. Rep.* 147.,) the court of C. B. considered this fact as a very material circumstance, and one which made the case to differ from all others on the subject of explaining a will by parol proof ; because, in all cases that had been before, the evidence was admitted to explain a part which, without such explanation, could have had *no operation*. But in that case, as there was sufficient to satisfy the devise according to the ordinary meaning of the description, collateral evidence, to show that the testator meant to use the description in a more extensive sense, was rejected. There was a similar decision in *Doe v. Brown*, (11 *East*, 441.,) and the two cases are strong in respect to this point.

My conclusion is, that the parol proof cannot be received or permitted to enter into the consideration of the case ; for it will readily be admitted, that to serve the particular purpose, or meet the supposed hardship, of an individual case, we ought not to break in upon the established principles of law. The observation of Lord Talbot, in one of the cases referred to, contains the true and wise doctrine on this subject, that it is *better to suffer a particular mischief than a general inconvenience*.

The only question, then, in this cause, is on the construction of all the will itself.

I do not perceive, from a perusal of the will, any reason for construing the word *moneys* beyond its popular and legal meaning. It means gold and silver, or the lawful circulating medium of the country. (Co. Litt. 207. a.) It may be extended to bank notes, when they are known and approved of, and used in the market, as cash. Perhaps it would be

proper to extend the term to money deposited in bank, for that is cash, and considered and used as cash placed there for safe keeping, in preference to the chest of the owner. It was mentioned by the counsel, in the recent *English* case of *Hotham v. Sutton*, (15 *Vesey*, 319.) that, under a bequest of "money," money and bank notes, in the possession of the testator, or at his banker's, will pass, and *nothing else*; and they said it had always been so considered; and the Chancellor observed, that stock never passed by the word money. Beyond these bounds the word cannot be extended, unless it be accompanied with explanations showing that the testator alluded to other property than his cash, and defining that property as money at interest, on bond and mortgage, or money in the public funds. If he uses the word absolutely, without any such accompanying qualification, or reference, it cannot be construed beyond its usual and legal signification, without destroying all certainty and precision in language, and involving the meaning of the will in great uncertainty. The difficulty would be to know what precise check to give to the force of the term, after we have once moved it from its seat; *vires acquirit eundo*. Shall it be confined to any particular species or description of choses in action? or shall it embrace, promiscuously, every species of debt and security—book debts, notes, bonds, mortgages, judgments, turnpike, manufacturing, insurance, bank, and national, stock? or must we go into a difficult inquiry to ascertain which of these securities was taken for cash lent, and which for goods or lands sold, or services rendered, and which as a compensation for torts or other causes of action? It appears to me that it would contravene the rules of law, and the policy of the statute, and be of dangerous consequence, to depart from the common and fixed meaning of the word moneys, and which meaning the testator must be presumed to have understood; especially as the bequest will still be effectual and productive. The cases of *Rose v. Bartlett*, (C. 292.,) and of *Day v. Trig*, (1 *P. Wms.* 286..)

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1814. may be cited to show, that where a will can have effect, words are not to be strained to enlarge the will; and that a lease for years will pass, under a devise of *all my lands*, if the testator had no fee simple estate; and this, in order to prevent the devise from being void; but if he had an estate in fee, the chattel interest will not pass. The testator, in the present case, understood how to explain the word moneys, when he meant to designate other property than his cash in hand. He uses it, repeatedly, in the subsequent parts of the will, but it is always with a clear and certain reference to the subject matter to which it is to be applied; as when he discharges his brother *Michael* "from the payment of all moneys which he shall owe me at my decease;" and when he bequeaths to the children of his brothers the remainder of his estate, "or the moneys arising from the sale thereof."

There is a settled distinction, on this subject of the construction of wills, between cash or money, and choses in action; and this increases the difficulty of the attempt which has been made to confound them. Thus, cash will pass by a bequest of moveables; but the better opinion, according to *Godolphin*, (*Orphan's Legacy*, p. 417. s. 9.,) is, that money at interest will not so pass, because it is a debt, and not cash. So, a devise of goods and chattels, in such a place, will not include a bond being there, as it has no locality; but it will include cash, and also bank notes, because they are considered *quasi cash*. (*Chapman v. Hart*, 1 *Ves.* 271. *Moore v. Moore*, 1 *Bro.* 127. *Fleming v. Brook*, 1 *Schoale & Lefroy*, 318.)

Nor is there any reason to infer, from the will, that due provision is not made for the widow, without permitting her to sweep away, under the denomination of money, all the notes, bonds, and mortgages belonging to the testator. The testator gives to her, in fee, his dwelling house and six acres of land lying on the *Bowery-road*, in the city of *New-York*. He also gives to her, in fee, two other lots in the same place.

containing an acre and a half ; and he further gives her all his household furniture, horses, farming stock, &c. The expression of all the *rest, residue, and remainder* of the moneys, &c. belonging to his estate, leaves the question of construction precisely the same as if those words had not been used, for the question still occurs, what were his moneys ? The words *rest, residue, &c.*, seem to be without use or meaning, as there used, for there were no moneys, previously alluded to, except the 1,000 dollars bequeathed to his niece, *Mary* ; and that sum was to be paid, at large, out of his *personal estate* ; and it is not contended that the word "moneys" can have such an extensive sense.

The result of my opinion is, that the executors must account to the plaintiffs for the bonds, mortgages, and notes left by the testator ; and a reference must be made to a master, to take and state an account between the parties, in which the defendants must be allowed for whatever payment and expenses are justly chargeable to the property ; and be chargeable with all the securities aforesaid ; and the question of costs, and all other questions, to be reserved until the coming in of the report.

Decree accordingly. (a)

(a) This case, which was decided the 27th of September, 1815, has been printed out of its chronological order ; it should have followed the case of *Woods v. Monell*, (*post*, p. 507.) The error, however, is not deemed of sufficient importance, to compensate the trouble and expense of correction.

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October 3d.SOUVERBYE AND WIFE *against* ARDEN AND OTHERS.

Declarations of the intention, or understanding, of a grantor, different from the intent apparent on the face of a deed, or of conditions annexed to it, to be effectual, must be made at the time of executing it.

If, at the time of executing a deed, there was no delivery, or intention to deliver, these are facts which should be explicitly proved by the grantor. So, a mistake in drawing a deed must be clearly proved.

If a deed has been duly delivered in the first instance, the subsequent custody of it, by the grantor, will not destroy the effect of the delivery.

A deed may be delivered to a third person, as the servant, or bailee, of the grantee, and such delivery will be valid.

A voluntary settlement, fairly made, is always binding, in equity, upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and, if he retain it, there must be other circumstances beside the mere fact of his retaining it, to show that it was not intended to be absolute.

THE plaintiff, *Eliza Bouquet*, and her former husband, *Vital Antoine Servant Grangiac*, filed their bill against *James Arden*, *De Witt Clinton*, and *Richard D. Arden*, to compel a conveyance, to the plaintiffs, of a lot of land in the city of *New-York*, and, also, for an account.

The bill charged that the defendant, *James Arden*, and *Eliza*, his wife, the father and mother of the plaintiff, *Eliza Bouquet*, in the year 1804, conveyed to *De Witt Clinton* and *Richard D. Arden*, a certain house, warehouse, and lot of land, extending from *Greenwich-street* into *Washington-street*, in trust for the said *Eliza Bouquet*; that the deed was duly acknowledged by the grantors, and at, or about, the time of the execution of it, delivered to the trustees. It was further stated, that *Eliza Arden* died about the 4th of *August*, 1806; and that *Eliza Bouquet*, on or about the 26th of *January*, 1809, married with *Grangiac*; and that the trustees had paid to *James Arden*, or permitted him to receive, the rents and profits of the trust estate, of which they refused to render the plaintiffs an account, or to pay

them what was due thereon, or to let them into possession of the estate, and the receipt of the rents and profits.

The defendants each put in a separate answer.

*James Arden* stated, that on or about the 25th of November, 1809, he was seized in fee of and in a certain messuage and tenements, and that he, and his wife, *Eliza*, being minded to make some provision for their daughter, the plaintiff, came to a resolution to execute a deed, or conveyance, for the said messuage and tenements, in such a way that the same should not, after his decease, vest in her absolutely, so as to be at her disposal, but that the same should go to her children, if she had any living at her decease, and, if not, return to his family. He further stated, that it was not then, nor ever was, his intention, or design, to part with the possession of the said lots, or to give up the rents and profits thereof, nor to vest the estate in such a manner as that it should go to the plaintiff, *Eliza Bouquet*, even after his decease, in case she married against, or without, his consent or approbation. The defendant applied to a counsellor at law, to draw a deed conformable to this his intention, which he supposed was drawn accordingly. The deed was upon the following trusts; that is to say, upon trust and confidence, that *Eliza Bouquet* should stand and be seized of the premises thereby granted, for, and during her natural life; in further trust and confidence, that in case *Eliza Bouquet* should die, leaving lawful issue, that then the trustees, *Richard D. Arden* and *De Witt Clinton*, should stand and be seized of the premises in trust, for such child, or children, of the body of *Eliza Bouquet*, lawfully to be begotten, in fee simple; and for want of such children, then in trust for all, and every the person, or persons, their heirs and assigns, for ever, as should be entitled to the same by the laws of the state of New-York, in case he, the said *James Arden*, had died intestate, and the deed had never been made. The deed was executed in the presence of two witnesses, and the defendant says, that he thinks it pro-

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bable, and believes, that he and his wife may have used the formal words of delivering the deed; but that neither of the trustees of *Eliza Bouquet* were present at the execution of it, and that it was not acknowledged by him, or his wife, before an officer authorized to take the acknowledgment thereof. The deed remained in the possession of the defendant until about the 6th of January, 1809, when, it being expressed to him that his daughter, and her sister, for whom he had made a similar provision, entertained some apprehension that the deed, in case of his death, might be lost, or destroyed, he consented to place the same in the hands of *De Witt Clinton*, for their benefit; that he accordingly delivered this deed, with another deed, intended for the benefit of his other daughter, to *Clinton*; and, at the time of the delivery, stated to him, in the presence of his present wife, and both his daughters, that it was to be explicitly understood that the income of the property should enure to him during his life; and that if either of his daughters should marry without his consent, or approbation, that the deed, intended for her benefit, should not operate, or be of use, or to that effect, according to his best recollection and belief; and these expressions, he supposed, were sufficient to create a conditional delivery of the deed, to take effect only after his decease. The defendant further stated, that the yearly value of the estate was about 1,500 dollars, which he had received, ever since the date of the deed, to his own use, paying taxes, &c., causing the premises to be insured, and paying the premium of insurance.

*Richard D. Arden*, in his answer, does not profess to state any thing from his personal knowledge; but as far as his answer goes, it is in confirmation of that of *James Arden*.

*De Witt Clinton*, in his answer, stated, that on or about the 6th of January, 1809, he, at the request of the defendant, *James Arden*, went to his house, and when there, *Arden* informed him, that he had requested him to call, with a view

of depositing in his hands two several deeds, for the benefit of his daughters, *Louisa* and *Eliza*; and that, thereupon, *Arden*, in the presence of his wife and daughters, delivered to him two deeds, one for each of his daughters; the deeds were enclosed in one envelope, which was labelled, or endorsed, as follows: "Two deeds, viz. one to *Louisa Ann Arden*, and one to *Eliza Bouquet Arden*; each for one lot of ground in *Greenwich-street*, through to *Washington-street*, to *Richard D. Arden* and *De Witt Clinton*, Esqrs., in trust, 1805." Immediately before, or at the time of the delivery, *Arden* stated, in the presence of his wife and daughters, that the property intended for each of his daughters was worth upwards of 21,000 dollars, and that the annual rent was 1,500 dollars; and that he wished it to be explicitly understood, that the income of the property should enure to him, during his life; and that if either of his daughters should marry without his approbation, that the deed intended for her benefit should not operate. Both the daughters acquiesced in the declaration, or arrangement, that the rents of the property should enure to *James Arden* during his life; but neither of them acquiesced in the declaration, or arrangement, that, if either of them should marry without his approbation, the deed intended for her benefit should not operate. There was no certificate of acknowledgment upon the deed. The defendant denied that any application had been made to him, by the plaintiff, relative to the property, or the rents and profits, or to an account thereof, or the receipt and application thereof; and stated, that shortly after the marriage of the plaintiff, *Eliza Bouquet*, with *Grangiac*, the defendant, *James Arden*, requested him to deliver up the deed to him, and offered to indemnify him from any pecuniary loss in consequence thereof; but this he refused to do.

After the cause was at issue, *Grangiac* died, and it was then continued in the name of *Eliza Bouquet*, the surviving

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plaintiff, and after her marriage with the plaintiff, *Souverbye*, in their joint names.

It appeared from the evidence, that the deed in question, together with one for the benefit of *Louisa Ann Arden*, (afterwards *Sterry*,) was executed on the 25th of December, 1805, in the bed room of *Eliza Arden*, who was then confined by sickness; and it is expressly stated, by several witnesses, that *Eliza Bouquet* and her sister *Louisa* were present. The plaintiff, *Eliza Bouquet*, married *Grangiac* on the 22d of January, 1809, and it was the general opinion of the witnesses, from the notoriety of the subject in the family, that he knew of the settlement which had been made by *Arden* on his daughter.

*Alexander Bleecker*, who was one of the subscribing witnesses to the two deeds, (*A. J. Hamilton*, who was examined, was the other,) stated, that he did not remember reading, or hearing them read, and that they were not put into the hands of the plaintiff, and *Louisa*, but that they were taken by *James Arden*, and that he did not know what became of them afterwards. He, however, said, that his recollection was faint as to the circumstances attending the execution; and *Agnes D. Braine*, who was also present, said, that *James Arden* read the two deeds aloud in succession, and after they were executed, gave them to *Eliza Arden*, his wife.

*Louisa Ann Sterry* testified, that *Eliza Arden*, her mother, previously to her death, used frequently to express a very anxious wish to her father, *James Arden*, that he would execute deeds making a settlement on the plaintiff and witness, and often urged him to have the two deeds in question signed, and that when the same was done, her mother expressed very great satisfaction on the subject, and said that she was very happy that they were thus handsomely provided for. The witness further testified, that at the time when the deeds were executed, *James Arden* handed to the witness, and her sister, the plaintiff, their respective deeds, which they laid upon the ledge of a case or wardrobe standing in the room.

The witness soon after took and locked up her own deed in her own bureau, but the plaintiff's deed remained in the same place until after the death of her mother; while it remained there, her father used to come into the room, which the witness and her sister occupied as their bed room, to get papers which he kept locked up in the lower part of the case or wardrobe, and upon seeing the plaintiff's deed lying upon the ledge, he observed, that it was careless to leave it so exposed, whereupon the plaintiff soon afterwards locked it up. The witness stated, that she delivered her deed to her father for safe keeping, and supposed that her sister, the plaintiff, had done the same, or that it was taken by her consent for that purpose. The witness further stated, that at the time the deeds were delivered to *Clinton*, her father said that she and the plaintiff must marry with his consent, and that she, the witness, immediately replied, "*Oh no, I will not agree to that,*" or words to that effect, and supposed that her father did not speak seriously. The witness said, that neither she nor her sister supposed that the property would be forfeited by their marrying without their father's consent.

*Agnes D. Braine*, a witness before mentioned, testified, that, when the deeds were executed, *Arden* gave them both to his wife; but the witness, after the death of Mrs. *Arden*, frequently saw the deeds lying on the ledge of the case before mentioned, in the bed room of the plaintiff, *Eliza Bouquet*, and her sister *Louisa*, and was present when they compared their deeds together, *Louisa* reading aloud her deed, and the plaintiff and witness at the same time looking over the other; they then laid down the deeds carelessly in the same place. The witness further stated, that, afterwards, while the witness was sitting with the plaintiff and her sister in the same room, *James Arden* came into the room, and took some papers out of the lower part of the case, and seeing the deeds in question lying as before mentioned, said, "*girls, how can you be so careless with your deeds?*" to which *Louisa* answered, that they were safe enough

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there, when he replied, "if you do not know how to take care of them, I will do it for you," or words to that import, and *Louisa* replied, "so do," or "so you may," or words to that effect, whereupon *Arden* took them out of the room, but what became of them afterwards the witness did not know. The witness also testified, that one day afterwards, the plaintiff observed to her father, that she was fearful he had given the deeds to *Richard Arden*, (one of the defendants,) and that if he had, *Richard* was not too good to burn them. *Arden* said he was surprised she should imagine any such thing; that *Richard* had not got the deeds; whereupon *Louisa* expressed a wish that he would put them into the hands of *De Witt Clinton* to keep, to which he replied, that he would do so, if that would make her content.

*Elizabeth Talbot* testified, that before the death of *Eliza Arden*, the witness visited her in her bed room, when she pointed to some papers on the desk or secretary, as being the deeds to her daughters, which the witness took up, and looked at what was written on the back of them, but does not now recollect what it was.

*Richard D. Arden* was examined as a witness on the behalf of *James Arden*, under an order of the court, and stated, that he saw the deeds shortly after the execution of them, and before the death of *Eliza Arden*, in the before-mentioned case or secretary, where he understood, and believes, they were left by *James Arden* at the time; that the case consisted of an upper and lower part, the upper part being something like a clothes' press, or wardrobe, and the lower part consist d of drawers, the upper one of which being drawn out, and the front part let down by means of a spring, formed a secretary or place for writing, and keeping papers; that it was in the secretary part that he saw the deeds both before and after the death of his mother; that the keys of both parts of the case had been left with the plaintiff, and her sister *Louisa*, after the death of their mother, by her request, and that they being in possession of

the keys, had access to the deeds, and might have taken them into their hands while they remained in the room, but that neither of them had possession of them other than as a clerk might be said to have possession of papers, which were accessible to him by means of their being open or exposed in the office or house where he should be employed. *James Arden*, afterwards, took the deeds from the bed room, and deposited them in his desk, in his office, being the same place where they were kept after they were drawn, and before they were signed.

*De Witt Clinton* was also examined under an order of the court, in behalf of the defendant, *James Arden*, but his deposition was, in effect, the same as his answer, and, therefore, is not necessary to be stated.

A considerable part of the evidence consisted of the declarations of *James Arden*, and *Eliza*, his wife, as to the intent with which the deeds were executed, and was also intended to prove that his daughters knew of, and acquiesced in the conditions.

*S. Jones*, jun., for the plaintiff. 1. The deed was duly delivered to the plaintiff, at the time its execution was witnessed. A deed may be duly executed, though the grantor takes it back into his custody; the title passes, and the deed cannot be avoided, but by matters subsequent. (13 *Vin. Ab.* (K) 22—(L) 24. pl. 3. *Cro. Eliz.* 7. *Shelton's case.*)

2. The delivery to *Clinton* was absolute in law. There can be no conditional delivery of a deed, except as an escrow. Now, it could not be an escrow, for it was a delivery to the party herself, that is, to her trustee, for her. (*Noy's R.p.* 6. *Hobart*, 246. 9 *Co.* 137.) Again, why execute the deed, if he did not mean to deliver it?

3. There is not sufficient evidence of a parol agreement at the time; and if it was made out with sufficient certainty, it was void. The conditions relied on were not made at the

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time of the first execution of the deed ; these conditions were after thoughts of the grantor. The nature of the deed is attempted to be altered and qualified by *parol* proof, which is clearly against every principle of law. The deed is absolute on the face of it ; as a bargain and sale, it operates by way of *use*. Such a reservation, if contained in the deed, would have made it void. The subsequent agreement is a parol reservation of a life estate. A person may, by will, transfer the fee after his death, but he cannot do it by deed, unless there is some previous estate. The condition is repugnant to the grant, and must avoid it. (2 And. 64. *Popham*, 49. *Moore*, 687. *Cro. Eliz.* 344. *Siderf.* 32.) If the grantor had died, after the delivery to *Clinton*, and before the marriage of his daughter, it would have been a valid deed. The subsequent condition depended on the will of the grantor solely. It was a power of revocation, at his pleasure, and resting in parol. Again, this agreement, or condition, was void by the statute of frauds. (1 H. Bl. 289. 3 *Wils.* 275. *Coupl.* 47. 1 *Vesey*, 317. 3 *Bro.* 168. *Str.* 1261. *Bl. Rep.* 1249. 4 *Bro.* 514. 5 *Ven. Contract*, (G) pl. 26.)

To allow a solemn deed to be defeated by parol proof of a subsequent condition, would be of dangerous consequence. (2 *Atk.* 383. 1 *Vesey*, jun. 241. *Sugd. Law of Vend.* 88, 89, 90.)

The defendant cannot, by his *answer*, correct a mistake in his deed. If he could show a mistake, and wished it to be corrected, he should have filed his bill for that purpose. Again, a delivery to a *cestuy que trust*, is a good delivery of a deed. (*Jenk. Cent.* 195, pl. 2. 13 *Vin. Ab.* 22, pl. 12.)

A deed of bargain and sale operating by way of *use*, the *use* must be in the grantee ; for a *use* in the bargainer will not feed a *use* to the bargainer ; though deeds which operate by way of transmutation of possession may admit of a different doctrine. (*Jackson v. Myers*, 3 *Johns.*

Rep. 388. Sanders on Uses, 129. Dyer, 155. a. 1 Co. 136. b. 137. a.)

There is no provision, in this case, for the estate going over, in case the condition was not performed.

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Harrison, and *Harris*, contra, contended, 1. That there was no delivery of the deed, at the time of its execution, in 1805. The answer, which is equivalent to the oaths of two witnesses, denied the delivery. The intention of the grantor, to annex the condition to the delivery, was manifest; and a deed may be delivered on conditions. The statute of frauds does not apply to such a case.

The only delivery, if any, was in 1809, to Mr. *Clinton*; and the condition of that delivery is fully proved. The defendants being called on to account, and acting defensively, may give parol evidence. (14 *Vesey*, 519. 7 *Vesey*, 219. 6 *Vesey*, 332, 333, 334. 1 *Vesey*, 456.) Though the rule might be otherwise, if the defendant was seeking an execution of the agreement. (4 *Vesey*, jun. 519. 2 *Vesey*, 219.)

There was no ground of equity on which this court can interfere to help the plaintiffs, at least, during the lifetime of the father. No rents were due at the time the bill was filed, and none ever came to the hands of either of the trustees. They were competent witnesses, being made defendants for form sake only. *Clinton* fully proves that the condition of the delivery to him, that *Arden* was to have the rents and profits during his life, was fully assented to by the daughters. The very fact of this delivery, in 1809, is evidence that the deed had not been delivered before. In the case of *Villers v. Beaumont*, (1 *Vern.* 100,) the party was not to have possession during life. The cases of voluntary settlements are those in which they were to take place after death.

Where a deed is deposited with a trustee, in trust, to receive the rents and profits during his life, there is no case

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Though, at law, the delivery would take effect, free from these conditions, yet, in equity, it will be otherwise, and the trustee will be considered like a third person at law, in the case of an escrow, and the terms of the delivery of the deed be supported. Where a party comes into equity, to compel a trustee to perform, the court will look at the intent, and not compel a trustee to act against the intent of the parties. The *defendants* may show the intent, as to the conditions, in *equity*; and so far, as ground of equitable relief, they may show the mistake, in not inserting the conditions in the deed, agreeably to the instructions given to the counsel for that purpose. The real sense and meaning of the parties must prevail here, and the court will not deprive the grantor of the rents and profits during his life, contrary to that intent. A consideration of one dollar will make a resulting trust enure to the grantor, in a deed of bargain and sale.

This court may, in its discretion, relieve against a voluntary deed. (*Prec. in Ch. 84.*)

Riggs, in reply, insisted, that the sealing and formal execution of the deed, was the perfection of the act; and the burden of proof lay on the grantor to show, clearly, that there was no delivery, at the time, contrary to the face of the deed. (*Wheelwright v. Wheelwright*, 2 *Tyng's Mass. Rep.* 447.)

Arden, in his answer, did not pretend that there was any explanation given to the witnesses, at the time of the execution of the deed, of any terms or conditions different from what appeared in the deed itself. If any such conditions were intended, it was the duty of the grantor to explain them to the witnesses *at the time*. The evidence of the two subscribing witnesses, is strong and conclusive as to the solemn execution and delivery of the deed, without any terms,

or explanation of the grantor, being declared or expressed. The mother of the grantee died in *August*, 1806, and until that time, the deed was in a drawer, under the power and control, if not in the actual custody, of the grantee.

The parol evidence was inadmissible ; it was against the statute of frauds. A *trust* cannot be created by parol.

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THE CHANCELLOR. Several points have been raised respecting the deed mentioned in the pleadings.

1. It is contended, on the part of the plaintiffs, that the deed was perfected by the sealing and delivery, on the 25th of *December*, 1805, and that the estate then passed and vested in the grantees, for the uses and purposes therein declared.

In my opinion, this allegation is fully and effectually supported by the proof.

The answer of the grantor, to this point, is, "that he and his wife signed, and, as he believes, sealed the deed, at or about the time it bears date, in the presence of two witnesses ; and he thinks it probable, and believes, that he and his wife may have used the formal words of delivery." He says, further, that he had applied to *Abraham Skinner* to draw the deed, so as not to part with the possession and profits of the lot during his life, and so as that the same should never vest in the plaintiff, his daughter, if she should marry without his consent and approbation ; that he supposed the deed was so drawn ; and that it remained in his possession and power from the time it was so signed and sealed, until the delivery to Mr. *Clinton*, in *January*, 1809.

The first reflection that arises upon this answer is, that it does not aver or pretend that any explanation was given to the witnesses, or to the plaintiff, or others, at the time of the execution of the deed, of the understanding or intentions of the grantor, at to its operation.

It was his duty to have spoken then, and to have declared his intention, if he had any, inconsistent with the natural

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and necessary result of that solemnity. The general principle of law is, that the formal act of signing, sealing, and delivery, is the perfection and consummation of the deed, and it lays with the grantor to prove clearly that the appearances were not consistent with the truth. The presumption is against him, and the task is upon him to destroy that presumption, by clear and positive proof, that there was no delivery, and that it was so understood at the time. If he understood, or supposed, that the deed was drawn conformably to his views, (as he asserts,) there was no need of any check to a complete and valid delivery, and he must have intended such delivery, as the deed would always have carried within itself the evidence of his intentions. I should conclude, therefore, from the answer alone, that there was a delivery of the deed, in judgment of law, in *December*, 1805. If there was a mistake in the drawing of the deed, the defendant had not undertaken to show it. He has not examined *Skinner*, who drew the deed, and he does not say that he had not perused the deed before he signed it. The presumption is irresistible that he must have known of its contents, and being of competent capacity to do business, he is justly chargeable with that knowledge. The mistake must be clearly and strongly proved, before the court can correct a deed or writing. (1 *Ves.* 317. 3 *Bro.* 454. 6 *Ves.* 333, 334.)

The evidence of the execution of the deed consists of the testimony of four persons who were present, and three of whom were subscribing witnesses. *Bleecker* and *Hamilton* attest to the execution of the deed in the usual way, and that they subscribed to it as witnesses. There was no condition, qualification, or explanation made. It was on a *Christmas* day, in the bed room of Mrs. *Arden*, whereshe was confined by sickness: *Bleecker* says he understood the purport of the deed, though his recollection is faint as to the circumstances respecting the execution, and he does not remember reading, or hearing it read. Mrs. *Braine* was also present, and saw

the deed executed ; and she recollects that the grantor read the deed aloud at the time. Mrs. *Sterry* was also present, and saw the deed executed, and heard the company congratulate her and her sister on the present of the deed ; and Mrs. *Aden* also expressed great satisfaction.

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These are all the witnesses who were present at the execution of the deed, who have been examined in the cause ; and as there was no explanation given, or conditions annexed, contrary to the natural and legal import of the deed, the proof of the due execution of it, so as to pass the estate, must be deemed to be full and absolute. If an act, so authentic, can be impaired by mental reservations, at the time, or by subsequent loose and idle conversations, there would be no safety in ordinary transactions, and no certainty in legal solemnities.

There has been a good deal of examination and inquiry as to the custody of the deed from the time of its execution, until the actual delivery of it to *Clinton*, in 1809. This inquiry does not appear to me to be very important ; for, whatever may have been the fact, as to the custody of it from 1805 to 1809, it cannot affect the operation of the deed, provided it was duly delivered in the first instance, so as to become valid in law. But these inquiries into the subsequent history of the deed, tend rather to confirm than weaken the direct and positive proof of the first and absolute delivery.

We have seen that the defendant alleges, in his answer, that the deed continued in his possession and power. One of the subscribing witnesses (*Bleecker*) says, that, to the best of his recollection, the deed was not put into the hands of the grantee, but was taken by the grantor. Mrs. *Braine* says, that it was delivered, by the defendant, to his wife. This fact is perfectly consistent with *Bleecker's* recollection. Mrs. *Sterry* says the deed was handed by the defendant to her sister, the plaintiff, and laid by her on the ledge, or projection of the case, or wardrobe, in the room ; and she proves that it remained in that open place until after Mrs.

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Arden's death, which was in August, 1806. That the defendant frequently came into the room for papers, which he kept locked up in the lower part of the case, and once made mention of the careless situation of the deed. Mrs. *Braine*, who spent a considerable part of her time at the house of the defendant, the summer after Mrs. *Arden's* death, proves the same fact about the situation of the deed, and the censure of the defendant upon such carelessness. Mrs. *Talbot* mentions a circumstance attending a conversation with Mrs. *Arden*, the summer she died, which corroborates the testimony of the other two witnesses as to the manner in which the deed was kept.

The testimony on the part of the defendant (*J. Arden*) is not in contradiction with the above history of the deed: *Richard D. Arden* saw the deed before the death of his mother, in the case or secretary in her bed room, and he says, that the plaintiff and her sister had the keys of the room after their mother's death, and at her request, and that the deeds remained for a considerable time in the bed room, after his mother's death, when the defendant took both the deeds, and put them in *his desk in his office below*, where *they had been after they were drawn, and before they were signed*. Mr. *Clinton* states, in his answer, that when the defendant, (*J. Arden*) delivered the deeds to him, they were enclosed in one envelope, and endorsed, "Two deeds, viz. one to *Louisa*, and one to *Eliza B. Arden*, each for one lot, &c., to *Richard D. Arden* and *De Witt Clinton*, in trust, 1805."

The conclusion, from all this testimony, is, that the grantor had not the custody and possession of the deed, until some time after the death of the mother of the plaintiff; but that the deed was in the actual possession of the plaintiff, or of her mother, as her agent and bailee. I am perfectly satisfied of the truth of this conclusion.

If we recur to the adjudged cases, and to the acknowledged rules of law on this subject, they will be found in

favour of the valid operation of this deed, whether the actual delivery was to the plaintiff or to her mother. This is much stronger, and attended with more circumstances of a due delivery, than *Shelton's* case. (*Cro. Eliz.* 7.) In that case, the deed was sealed in the presence of the grantee and others, and was read, but not delivered; nor did the grantee take it, but it was left behind in the same place; and yet, in the opinion of all the justices, it was a good grant, for the parties came together for that purpose, and performed all that was requisite for perfecting it, except an actual delivery; being left behind, and not countermanded, it was held to be a delivery in law. In the ancient authorities, and at a time when the execution of deeds was subjected to great technical formality and strictness, it was admitted, that if *A.* execute a deed to *B.*, and deliver it to *C.*, though he does not say to the use of *B.*, yet it is a good delivery to *B.*, if he accepts of it, and it shall be intended that *C.* took the deed for him as his servant. (*Paston, J., Year Book, 3 H. 6. 27. A.* and *Anon*, cited in 13 *Viner*, 23. K. pl. 12. *A.*) The case of *Taw v. Bury*, (2 *Dy.* 167. b.) is a strong determination on this point: *A.* delivered a deed to *B.*, to deliver over to *C.*, as his deed; *B.*, did so, and *C.* refused to accept the deed, and it was, accordingly, left with him by *B.* It was held to be the deed of *A.*, and enuring to the benefit of *C.*, by the first delivery, and before any actual delivery over to the party; and that the subsequent refusal of the party could not undo it as a deed from the beginning. To the same purpose is *Alford* and *Lea's* case, in 2 *Leon.* 110.

It is not to be understood that mere formal words of delivery will, in all cases, bind the party, and render the deed absolute. If it be declared, or agreed, at the time of execution, that the deed is not to pass out of the possession of the grantor, until certain conditions are complied with, the deed will not operate until certain conditions are fulfilled. This has been so ruled at law, in the cases of *Jackson v. Dunlap*, and of the *Derby Canal Company v. Wilmot*, (1 *Johns.*

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Cas. 114. 9 East, 360.,) and there is much good sense and equity in the decision. But if there be no such agreement or intention made known at the time, and both parties are present, and the usual formalities of execution take place, and the contract is, to all appearance, consummated, and the deed is left in the power of the grantee, or in the custody of his particular friend, without special instructions, there is no case to be found in law or equity, in which such a delivery is not held binding.

A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof, that he never parted, nor intended to part, with the possession of the deed ; and even if he retains it, the weight of authority is decidedly in favour of its validity, unless there be other circumstances, beside the mere fact of his retaining it, to show it was not intended to be absolute. This will appear from an examination of a few of the strongest cases on each side of the question.

In *Naldred v. Gilham*, (1 P. Wms. 577.,) the aunt made a voluntary settlement upon her nephew, then an infant of only four years old, and both parts of the deed were kept in her own possession, and, some years afterwards, she made a different settlement on another nephew. The circumstances attending the execution of the deed do not appear, but Lord *Macclesfield* refused to establish the first settlement, and concluded, not only from the fact of her keeping the custody of both parts of the deed, *but from several other circumstances*, that it was a case of surprise and imposition in making the first settlement absolute without power of revocation; and in a case which I shall presently mention, Lord *Hardwicke* said, that this decision was not applicable to every case, but was dependent upon particular circumstances. In *Cotton v. King*, (2 P. Wms. 358.,) the mother made a voluntary settlement, in trust for her children, and delivered the duplicate deeds into the hands of her attorney and agent, "with a strict charge that he should not part with them;" and no

other person was privy to the transaction, and Lord Chan.
King held the settlement not binding. Again, in *Ward v. Lant*, (*Prec. in Ch.* 182.,) the father executed a voluntary bond to his daughter, without any condition, and payable immediately; but he always kept it by him, and it was proved to have been his intention that no use should be made of it, and that it was only to protect him from taxes, and it was, accordingly, set aside.

It is easy to perceive that there is no analogy between these cases and the present; and yet they are, perhaps, as strong as any to be met with in favour of the failure of the settlement. There are other cases which show, affirmatively, that the mere retention of the deed by the grantor, is not sufficient to defeat it.

In *Clavering v. Clavering*, (2 *Vern.* 473.,) a voluntary deed of settlement, in trust, made in 1684, always kept by the grantor in his custody, and never published, and found, after his death, among his papers, was held to control a subsequent settlement, in 1690. The Lord Keeper said, that though the first settlement was always in the grantor's custody, *that* did not give him a power to resume the estate; and he referred to *Lady Hudson's* case, where a father, having taken displeasure at his son, made an additional jointure on his wife, but kept it in his power; and being afterwards reconciled to his son, cancelled the additional jointure, and died; and his wife was allowed, after his death, to recover on the cancelled deed. The decree of the Lord Keeper was, afterwards, affirmed in the house of lords. (1 *Bro. P. C.* 122.) The decision in *Boughton v. Boughton*, (1 *Aik.* 625.,) was to the same effect, and Lord *Hardwicke* made it, with the case of *Naldred v. Gilham* full in his mind. He held, that a voluntary deed, formal as to its execution, and without a power of revocation, and kept by the grantor uncancelled, was not to be defeated by a subsequent will. He went still further, in the case of *Johnson v. Smith*, (1 *Ves.* 314.) The father, in that case, assigned all his

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his own writings, and he continued to deal with the securities
as his own. He afterwards executed a bond to the daughter ; and the Chancellor, after his death, put her to her election, between the deed of assignment and the bond.

I am accordingly of opinion, that the deed in question was duly executed, in *December*, 1805, so as to pass the estate ; and that it was not, and could not be, defeated by any subsequent acts or declarations of the grantor. A voluntary settlement, without power of revocation, cannot be revoked. (*Villers v. Beaumont*, 1 *Vern.* 100. *Bale v. Newton*, 1 *Vern.* 464.) It becomes, then, unnecessary to examine and decide on the force and effect of such a delivery as that made to *Clinton*, in 1809. If a deed be duly executed, in the first instance, so as to take effect, any subsequent delivery is null and void. (*Co. Lit.* 48. b.)

The plaintiffs ought to be let into the possession, and the defendant, *James Arden*, to account for the rents and profits, from the time of the marriage of the plaintiff with *Servant*, the 22d of *January*, 1809, when she ceased to be supported in the family of the defendant ; and let a reference be made to a master for that purpose ; and all other questions are, in the mean time, reserved.

The following decree was thereupon entered :

" That the deed of conveyance from the defendant, *James Arden*, and *Eliza*, his then wife, to the defendants, *De Witt Clinton* and *Richard D. Arden*, bearing date the 25th of *November*, 1805, mentioned and set forth in the pleadings and proofs in this cause, was duly executed and delivered by *James Arden*, and *Eliza*, his then wife, on the 25th of *December*, 1805, so as to pass the estate and interest in the messuage and premises therein described, to the defendants, *De Witt Clinton* and *Richard D. Arden*, and to vest the same in them, to the uses, and upon the trusts, therein

mentioned ; and the deed of conveyance is hereby declared valid and effectual, in the law, accordingly. And it is further ordered, adjudged, and decreed, that the plaintiffs, *Saint Martin Souverbye*, and *Eliza Bouquet*, his wife, in right of *Eliza Bouquet*, be forthwith let into the possession of the premises mentioned and described in the deed of conveyance from the defendants, *James Arden*, and *Eliza*, his then wife, to the defendants, *De Witt Clinton* and *Richard D. Arden*, bearing date the 25th of November, 1805, and into the perception of the rents and profits thereof, in arrear, and unpaid, and hereafter to accrue and become payable, or that *De Witt Clinton* and *Richard D. Arden* be immediately let into the possession thereof, as trustees, upon the trusts, and to the uses, in the deed expressed and declared, of and concerning the same. And in case *De Witt Clinton* and *Richard D. Arden*, or the survivor of them, shall take possession of the premises, they, or the survivor of them, shall receive and take the rents and profits thereof, in arrear and unpaid, and which shall hereafter accrue, and become payable, in trust for, and pay over the same, from time to time, to *Saint Martin Souverbye*, and *Eliza Bouquet*, his wife, in right of *Eliza Bouquet*, during their joint lives, and to *Eliza Bouquet*, during her life, if she shall survive *Saint Martin Souverbye*, her husband ; or they, *De Witt Clinton* and *Richard D. Arden*, and the survivor of them, shall permit *Saint Martin Souverbye*, and *Eliza Bouquet*, his wife, in right of *Eliza Bouquet*, to take the rents and profits during their joint lives ; and that *Eliza Bouquet* is to take the same, during her life, if she shall survive her husband ; and after the death of *Eliza Bouquet*, one of the plaintiffs, the rents and profits of the premises shall be received, paid, and applied, according to the uses and trusts in the before-mentioned deed of conveyance, bearing date the 25th of November, 1805, limited and declared. And that the trustees, or the survivor of them, and any other person then claiming an interest therein, un-

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der the deed of conveyance, shall be at liberty to apply to this court, for its direction in that behalf. And it is further ordered, adjudged, and decreed, that the defendants, *De Witt Clinton* and *Richard D. Arden*, shall, within twenty days after notice of this decree, cause the deed of conveyance to be acknowledged, or proved, and recorded, according to law, for the greater safety of the title of the plaintiffs in this cause to the premises therein contained, and all others who may become interested therein. And it is further ordered, adjudged, and decreed, that the plaintiffs, during their joint lives, and *Eliza Bouquet*, after the death of *Saint Martin Souverbye*, her husband, if she shall survive him, shall be at liberty to use the names of the trustees, or the survivor of them, and to have the use of the deed of conveyance, for the purpose of prosecuting at law, or taking any reasonable measures to obtain the possession of the premises, and for receiving the rents and profits thereof, according to their, and her rights to the same, as herein-before declared and adjudged. And it is further ordered, adjudged, and decreed, that the defendant, *James Arden*, account with the plaintiffs in this cause, for the rents and profits of the premises, from the 23d of January, 1809, and that it be referred to one of the masters in chancery to take the account accordingly; and that, in taking the account, the master charge *James Arden* with the rents of the premises received, or which, without wilful default, might have been received for the same; and that the master make all just allowances to *James Arden*, for taxes and repairs; and that the master who shall take the account, report thereon, to the court, with all convenient speed. And it is further ordered, that the question of costs, and all further directions, be reserved until the report shall come in."

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A voluntary conveyance, intended as a settlement for a child of the grantor, is void, as against a subsequent purchaser for a valuable consideration, with only implied notice of the previous deed, by the statute of frauds.

But such deed may become valid by matter *ex post facto*, as by some valuable consideration intervening.

Marriage is such a valuable consideration; and, therefore, if the grantee in a voluntary deed, gains credit by the conveyance, and a person is induced to marry her, on account of the provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary, and becomes good against a subsequent *bona fide* purchaser for a valuable consideration.

And it makes no difference whether any particular marriage was in contemplation at the time of the voluntary settlement, or not.

*LOUISA ANN*, one of the plaintiffs in this case, and one of the daughters of *James Arden*, and *Robert Sterry*, her husband, filed their bill to obtain the benefit of a conveyance made to the defendants, *Richard D. Arden* and *De Witt Clinton*, in trust for her, by her father, *James Arden*, and for an account. The circumstances attending the execution and delivery of this deed are the same as those stated in the preceding case, in regard to the deed to the plaintiff's sister, *Eliza B. Arden*; and which it is, therefore, unnecessary to repeat.

The circumstances peculiar to this case, stated in the bill, were, that on the 11th of December, 1809, the plaintiffs married, and had a child born, which is still living. That the plaintiff, *Robert Sterry*, when the marriage took place, understood, and believed that *Louisa Ann* had a beneficial interest in the trust premises, according to the conveyance. That *James Arden* fraudulently executed a deed of conveyance of the trust premises to the defendant, *Philip Verplank*, a relation, who, knowing the interest of the plaintiffs in the premises, fraudulently accepted such deed, and claimed to hold the premises by virtue thereof: they, *James Arden* and

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*Philip Verplank*, thereby intending to defraud the plaintiffs, and defeat the deed in trust for *Louisa Ann*, and the estate thereby created. That the pretended deed to *Verplank* was dated the 11th of *December*, 1809, and expressed to be in consideration of a large sum of money paid, by him, to *James Arden*; but that, in fact, the deed was not executed on that, but on some subsequent day, and fraudulently dated anterior to its actual delivery; and that, if, in fact, it was executed on the 11th of *December*, 1809, it was so executed and accepted, at an hour subsequent to, and with full knowledge of the marriage of the plaintiffs; and that the consideration, mentioned in the deed to *Verplank*, was never truly paid, or secured by him, to *James Arden*, from the proper funds of *Verplank*.

*James Arden*, in his separate answer, stated, in relation to the sale to *Verplank*, that considering himself, in consequence of *Louisa Ann's* marriage without his consent, as the absolute owner of the premises, he did, on or about the 11th of *December*, 1809, sell and convey the premises to the defendant, *Verplank*, for the consideration of 16,000 dollars, paid to him by *Verplank*, on the delivery of the deed; and that the deed was executed on some day between the 11th and 14th of *December*, 1809, but on which day he did not recollect; but it was after the intermarriage of the plaintiffs.

*Verplank*, in his answer, stated, that before the execution of the deed from *Arden* to him, he had heard that *Arden* had made some provision for his daughters, out of property situated in *Greenwich-street*, but who informed him he could not recollect, and was wholly ignorant of the circumstances attending such provision, or the manner in which such settlement was made. That at the time the deed from *Arden* to him was executed, he had no knowledge, or notice, that the premises conveyed to him had been previously conveyed to the trustees, on the trust, as stated in the bill of the plaintiffs; that he purchased the premises for

16,000 dollars, and that, on or about the 11th of *December*, 1809, he received the deed; that for several months prior to the execution and delivery of the deed to him, he was in treaty with *Arden* for the purchase of the premises, and the terms of purchase were partly agreed on, at least one month prior to the 11th of *December*, 1809; and that, at the time of the execution of the deed to him, he had no knowledge, to the best of his recollection, of the intermarriage of the plaintiffs; that he could not recollect the precise day on which the deed to him was executed, but is positive that it was executed between the 11th and 14th of *December*; that he actually paid the whole consideration mentioned in the deed, and has, since the execution thereof, received the rents and profits of the premises in question, to his own exclusive use; that he married the niece of *James Arden*; and he insisted, that the prior deed, in trust for *Louisa Ann*, was voluntary, and void, by virtue of the act, entitled, "An act for the prevention of frauds."

It was proved that the plaintiff, *Robert Sterry*, knew, previous to the marriage, of the settlement which had been made upon the plaintiff, *Louisa Ann*, and that the premises were worth about 20 or 21,000 dollars.

*S. Jones*, jun. and *Riggs*, for the plaintiffs, contended, that the purchase of *Verplank*, though for a valuable consideration, if made with notice of the prior voluntary settlement, was void. Though there may be some colour of equity, that a *bona fide* purchaser, without notice, and for a valuable consideration, the vendor being in possession, should be preferred to a prior voluntary settlement, yet there is no such equity in his favour, where he purchases with notice of the prior settlement. Policy does not require, in that case, that there should be such a preference, and it would be unjust. The stat. of 27th *Eliz.* speaks only of *fraudulent*, not voluntary conveyances. And such a construction ought not to be given to the statute, as would defeat a prior voluntary

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settlement, in favour of a purchaser with notice of it. Where the voluntary deed is fair, legal, and honest, at the time, it will not be defeated by any subsequent matter, unless by the act of the grantee, or where the rights of a purchaser, in equity, require it. A purchaser, *with notice*, is not a *bona fide* purchaser. He attempts, *knowingly*, to defeat the vested rights of other and innocent persons.

The only three cases in *England*, decided since the year 1776, which go to sanction a different doctrine, ought not to be received as authority here, especially, when it is not denied that they are against principle, and not founded on a true construction of the statute. The cases in favour of voluntary settlements are numerous, and a summary of the law on this subject may be found in the opinion of Lord *Ellenborough*, in the case of *Doe, ex dem. Otley, v. Manning*, (9 *East*, 59—63.) These cases all go to show, that voluntary conveyances may afford *presumption* of fraud, yet they are not absolutely void at common law, or under the statute, as against a subsequent purchaser. (See Sir *Ralph Bory's case*, 1 *Vent.* 193. *Jenkins v. Kemis, Hard.* 398. 1 *Lev.* 150. *Lavender v. Blackstone*, 2 *Lev.* 146. *Garth v. Mois*, 1 *Keb.* 486. *Style*, 441—446. *Gibb. Law of Evid.* 201. (245.) 2 *Wils.* 357. *Coupl.* 434. 705. 2 *Bl. Com.* 300, 301. 1 *Vern.* 364. 3 *Atk.* 238.) Love and affection are a good consideration for a conveyance, and the deed, in this case, is most clearly honest and meritorious. (2 *Bulst.* 225.)

The *English* judges, in late decisions, have regretted that a different doctrine has prevailed; but they thought too much property was held under it to allow them to decide differently; though, if the case were *res integra*, they would have given a different construction to the statute, and supported these honest family settlements. (1 *Fonbl. Eq.* 269, 270. n. g. *Sugden's Law of Vend.* 433. 1 *Bay's S. C. Rep.* 173.)

This court is not embarrassed with any such difficulty ; and ought to disregard a rule so repugnant to principle, and to the good sense and sound construction of the statute.

That *Verplank* is chargeable with notice of this prior deed, there can be no doubt. Notice may be actual, or constructive, and what is enough to put the party on inquiry, is sufficient notice. (1 *Aik.* 489. 2 *Aik.* 54. 174. 2 *Bro.* 291. 1 *Ch. Cas.* 28. 259. 2 *Vesey*, jun. 440. 2 *Ch. Cas.* 246. 1 *Fonbl. Eq.* 271. *Newland on Contracts*, 54. *Sugden's Law of Vend.* 498.)

Again, the marriage of the plaintiff intervening prior to the purchase, it is to be presumed to have been an inducement to the settlement, and forms a consideration, *ex post facto*, which makes the conveyance valid and effectual, as if given, originally, for a valuable consideration. (*Sugden's Law of Vend.* 436, 437. 1 *Sid.* 133. *Skinner*, 423. 1 *East*, 95. 10 *Johns. Rep.* 185. 9 *Vesey*, 190. 9 *East*, 69. 5 *Vesey*, 862. *Bac. Abr. Frauds*, (C.) *Newland on Contracts*, 404. *Roberts on Fraud. Con.* 195. *Prec. in Ch.* 275.)

Harrison and Harris, contra, contended, that there was no delivery of the deed, and that it having been retained by the father in his possession, it was inoperative. (1 *P. Wms.* 577.)

The deed, in this case, was purely *voluntary* ; it is proved that the one dollar, mentioned as the consideration, was never paid. Then, *Verplank*, being a *bona fide* purchaser for a valuable consideration, without notice, the prior *voluntary* deed is void as against him. *Verplank*, in his answer, denies that he had notice, and no notice, in fact, has been proved. A mere rumour, or report, of the kind stated, is not sufficient to charge a party with notice. The grantor had been in continued possession since the date of the deed, for four years, and *Verplank* had a right to consider him as the owner. The case of *Ottley v. Manning*.

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(9 *East*, 69.,) is conclusive on the point, and there are numerous cases to the same effect, which prove, incontestably, that it is the established rule in *England*, that a voluntary conveyance, under the statute of the 27 *Eliz.*, is fraudulent against a subsequent purchaser for a valuable consideration. (*Tothill's Rep.* 257, 258. 1 *Ch. Rep.* 78. 2 *Vesey*, 10. *Woodie's case, cited Cro. Jac.* 158. 2 *Bl. Rep.* 1019. *Comp.* 279. 2 *Bro.* 148. 4 *Bos. & Pull.* 332. 2 *Taunt. Rep.* 82. 4 *Cruise, Deed*, tit. 32. ch. 22. s. 29—32. *Sugden's Law of Vend.* 2d ed. 432.)

The cases cited to the contrary are chiefly loose *dicta*, and the opinion of Lord *Mansfield*, in *Chapman v. Emery*, (*Comp.* 279.,) was prior to his *dictum* in *Cadogan v. Kent-nat*, and in *Doe v. Routledge*.

Lord *Ellenborough*, in *Otley v. Manning*, does not deny that this is the construction of the statute, but is inclined to think that the statute itself ought to have been different.

The *marriage*, in this case, did not render the consideration, of the prior conveyance, *valuable*. Being against the consent of the grantor, it could be no inducement to him in making the settlement. The marriage could be no benefit, or comfort, to him, when against his will. Such a *marriage* cannot change the original character of the conveyance.

Again, it is not proved that *Sterry* knew of the conveyance before the marriage ; if he did, he must be presumed, also, to have known of the conditions annexed to the deed ; and, then, he married subject to the effects and consequences of those conditions.

THE CHANCELLOR. The same questions arise in this case

* *Anle*, p. 240. as in that of *Souverbye and wife v. J. Arden and others*,* on the delivery of the deed. The two deeds were drawn and executed together, and their history is, in all respects, the same. The proof, then, in each cause, is the same, to every essential purpose ; and though *Bleecker*, one of the subscribing witnesses to each deed, was not examined in this last case, yet his testimony, and that of the other witnesses

in the other cause, applies equally to the execution and disposal of deeds, and it was averred upon the argument, that the depositions in each cause were, by consent, to be read in the other. Whether this be so, or not, does not appear to be in any way material ; for, I consider the proof taken in this cause to be the same, in effect, as that in the other, and quite sufficient to establish the delivery of the deed, in 1805. We have, in this case, the additional deposition of *R. I. Livingston*, who states, that he saw the deed in possession of *Louisa*, the grantee. The opinion which I have already given in the other case, would then apply to, and govern this, was it not for a new matter of defence set up by *Verplank*, who claims to be a subsequent *bona fide* purchaser. This necessarily leads me to the consideration of two very important points arising out of this case :

1. Whether the voluntary conveyance to the daughter was fraudulent and void, under the 3d section of the act of the 26th of *February*, 1787, [s. 10. c. 44., and which is the same, precisely, as the statute of 27th *Eliz.* c. 4.,] as against a subsequent purchaser for valuable consideration ; and, if so, then,

2. Whether the intervening marriage of the plaintiffs, between the settlement and the purchase, did not restore the first deed, and give it value and validity.

1. I shall consider *Verplank* as a purchaser for a valuable consideration. He gave 16,000 dollars in cash, and, though it may have been a very cheap purchase, there was not such inadequacy of price as to justify an inference of fraud. I shall, also, consider him as a purchaser without actual notice of the settlement upon the plaintiff. He declares in his answer, that he had no knowledge or notice of the conveyance of 1805, when he purchased, and there is no proof to contradict this answer. But I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry. He admits that, before the execution of the deed, he had heard that the grantor had made some provision for his daughters out of property in *Greenwich-street* ; and there is no evidence in the

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case, that the grantor owned any other property in that street, except the lots included in the settlement. Here, then, is the case of a fair voluntary conveyance, made by a father to his daughter, he not appearing to be indebted at the time, and a subsequent sale made by him, with intent to defeat that settlement, but made for a valuable consideration, and to a purchaser chargeable only with notice in law. The question arising on this first point is definitively settled, in *England*, by determinations of a recent date in the four great courts at *Westminster*; and it is impossible not to feel all the respect which is justly due to decisions of so much weight and authority. (*Evelyn v. Templar*, 2 Bro. 148. *Doe, ex dem. Ottley v. Manning*, 9 East, 59. *Doe v. Martyn*, 4 Bos. & Pull. 332. *Hill v. The Bishop of Exeter*, 2 *Taunt*. 82. *Doe v. Hopkins*, in the *Excheq.*; cited in 9 *East*, 70.) The voluntary deed is considered fraudulent and void against the subsequent deed, and it is held to be immaterial whether the purchaser had, or had not, notice of the prior deed; and it was an old settled rule, decided in *Gooch's case*, (5 Co. 60.,) that notice to a purchaser, of a fraudulent deed, was of no consequence, as it was still void.

It has been suggested, that this is a principle settled in *England* since our revolution; but it appears to me that the late cases have declared no new doctrine, and have only followed the rule as they found it, long before settled by a series of judicial decisions of too much authority to be there shaken. In the late case in *East's Rep.* Lord *Ellenborough*, in delivering the opinion of the K. B., gave a full and accurate view of most of the cases on both sides of the question, from the time of the statute of *Elizabeth*; and no one who examines that opinion attentively, and, especially, if he also inspects the original cases referred to, can well hesitate as to the correctness of the conclusion drawn by the court, that "the weight, number, and uniformity of the authorities, in favour of the rule as there decided, do very much preponderate."

It cannot be expected that I should attempt to go over,

in detail, the numerous cases which have been so ably arranged and reviewed, and so fairly stated in the opinion referred to. I shall content myself with merely alluding to them, and with the remark, that those cited in favour of the position, that the voluntary deed is only, *prima facia*, fraudulent as against the subsequent purchaser, are, generally, mere *dicta*, and not solemn adjudications upon the point.

In favour of the voluntary settlement, are Sir *Ralph Boy's case*, 1 *Vent.* 193. *Jenkins v. Kemeshe*, *Hard.* 398. 1 *Lev.* 150. *Lavender v. Blackstone*, 2 *Lev.* 146. *Garth v. Mois*, 1 *Keb.* 486. *Anon. Sty.* 446. *Gilbert's Law of Ev.* 201. *Standon v. Charlwood*, *MSS.* cited 9 *East*, 64. Lord *Mansfield*, in *Cadogan v. Kennett*, *Cwmp.* 434., and in *Doe v. Routledge*, *Cwmp.* 708. 710.

In favour of the subsequent purchaser, are *Woodie's case*, cited in *Culville v. Parker*, *Cro. Jac.* 158. *Prodgers v. Langham*, 1 *Sid.* 133. *White v. Hussey*, *Prec.* in Ch. 14. *Tonkins v. Ennis*, 1 *Eq. Cas. Abr.* 334. pl. 6. *White v. Sansom*, 3 *Atk.* 412. *Townsend v. Windham*, 2 *Ves.* 10. *Roe v. Milton*, 2 *Wils.* 356. *Goodright v. Moses*, 2 *Bl. Rep.* 1019. *Chapman v. Emery*, *Cwmp.* 278. Lord *Kenyon*, in *Nunn v. Wilsmore*, 8 *Term*, 528. There are, however, some cases which are not mentioned in the opinion delivered by Lord *Ellenborough*, and which, as it seems to me, give additional weight to the opinion which has been adopted. Thus, in *Walker v. Burrows*, (1 *Atk.* 93.,) Lord *Hardwicke* observes, "It has been said, all voluntary settlements are void against creditors, equally the same as they are against subsequent purchasers, under the statute of 27 *Eliz. ch.* 4., but this will not hold;" and he afterwards adds, "But, upon the statute of the 27 *Eliz.*, which relates to purchasers, there, indeed, a settlement is clearly void, if voluntary, that is, not for a valuable consideration, and the subsequent purchasers shall prevail to set aside such settlement." Again, in *Upton v. Bassett*, which was shortly after the statute, (*Cro. Eliz.* 445.,) there was an evident admission and understanding of all the judges,

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that a voluntary conveyance was void, under the 27 *Eliz.*, against a subsequent *bona fide* purchaser for valuable consideration. The case of *Taylor v. Stile*, is cited by *Sugden*, p. 483., as being decided in chancery, in 1763, and in which Lord *Northington* held it to be clear, that a subsequent purchaser for valuable consideration, though with notice, should set aside a voluntary settlement; and Mr. J. *Bathurst* said, he knew that Lord *Hardwicke* had determined so in twenty instances. In *Douglass v. Waad*, (1 *Ch. Cas.* 99.,) the court of chancery set aside a voluntary conveyance as fraudulent against a subsequent purchaser, and though the court are reported to have said, "that all voluntary conveyances are, *prima facie*, to be looked upon as fraudulent against purchasers, unless the contrary be made to appear," yet the decree was conformable to the principle contended for by the purchaser, for it set aside the voluntary conveyance as fraudulent, though nothing appeared but the want of valuable consideration to make it so. It is, also, worthy of notice, that, in the original text of the treatise of equity, published in 1737, and of which *Fonblanche* is the editor, (1 *Fonb.* 268.,) the same doctrine is explicitly laid down. In short, the principle set up in favour of the purchaser, has been so long and so well established, by a series of authoritative decisions, supported by the most eminent judges, that I feel bound by them, whatever doubts I might have had upon this construction of the statute, if I had been at liberty to follow my own reflections. When a principle has taken such deep root, and received such uniform support, it belongs to the legislature, and not to the courts of justice, to suppress or destroy it.

It has been observed, that the present defendant was not a purchaser with actual notice of the deed of settlement. He does not, therefore, come within the exception for which some have contended. Doubts have been frequently expressed, whether the better construction of the statute would not have been to support the voluntary conveyance

against purchasers for a valuable consideration, *with notice*; (and to that opinion I strongly incline;) yet it is pretty evident, that the allusion here was only to the case of *actual notice*, where the purchaser was intentionally and premeditately defeating the fair claims and expectations of the prior grantee. (9 *East*, 71. 4 *Bos. & Pull*, 335. 1 *Fonb.* 269. n. g.) Equity does make a distinction between purchasers with and without notice of the prior voluntary settlement made without fraud; but it is only when the former comes for the aid of the court to compel a specific performance, and it then refuses its aid, and leaves him to his remedy at law. (*Bennet v. Musgrave*, 2 *Ves.* 52. *Owley v. Lee*, 1 *Atk.* 625.)

2. The next point is, whether the marriage of the plaintiffs, before the purchase, did not give a new character to the first deed, so as to entitle it to preference.

It is admitted, that the deed to *Verplank* was made and executed after the marriage, and in consequence of it, and the testimony in the case is decisive, (I refer to the depositions of Mrs. *Servant* and Colonel *Hawkins*,) that the plaintiff, *Robert Sterry*, married with previous knowledge of this deed of settlement on his wife. Under these circumstances, I consider the law to be, that the first deed became good and valuable, and ought to prevail. The marriage was a valuable consideration, which fixed the interest in the grantee against all the world; she is regarded, from that time, as a purchaser, and as much so as if she had then paid an adequate pecuniary consideration. It has been a principle of long standing, and uniformly recognised, that a deed, voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*. (1 *Sid.* 133. 1 *East*, 95.) It is the constant language of the books, and of the courts, that a voluntary deed is made good by a subsequent marriage, and a marriage has always been held to be the highest consideration in law. (*Co. Litt.* 9. b.) The cases do not require that the settlement should have been

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made with a view to any particular marriage ; it is sufficient that the settlement was afterwards known to third persons, and was one probable inducement to the subsequent marriage. Indeed, in *Brown v. Carter*, (5 Ves. 877. 888, 889.,) Lord *Alvanley* did not think it very material to prove that the marriage was even made with notice of the voluntary settlement, as the knowledge of the circumstances of the party, and the inducement, were to be presumed. The principle is, as it is there stated, that it would be a fraud on the husband, if the probable inducement was to be afterwards withdrawn, and that it would be gross injustice to take away the benefit of the settlement from the married parties, and their issue. The case of *Prodgers v. Langham*, (1 Sid. 133.,) is a leading one on this point, and it has always been mentioned as good law. That was a case of a voluntary conveyance, in trust, for an only daughter for twenty-one years, to the intent that the profits, before marriage, should be applied to her maintenance, and, if she married with the father's consent, then in trust for her during the residue of the term. The court held, that the conveyance to the daughter was a voluntary conveyance, and would have been void as against the defendant, a subsequent purchaser for valuable consideration, if the marriage had not intervened, yet when that took effect, it ceased to be voluntary, and became supported by a valuable consideration, which was unimpeachable, inasmuch as the marriage was an advancement to the daughter, and the husband was induced (though that fact does not appear in the case) by the prospect of this provision. The case of *Kirk v. Clark*, (Prec. in Ch. 275. 2 Eq. Cas. Abr. 45. pl. 13.,) is equally in point ; it was there held, by Lord Ch. *Cowper*, that a voluntary settlement on a son, before any treaty of marriage, or the contemplation of any, became valuable upon his marriage, which was made with notice of it, the settlement being regarded as a principal inducement. A similar decision was made in the case of the *East-India Company v. Clavell*, (Prec.

in Ch. 380, 381.,) and the proof here, brings this case precisely within the reach of those I have cited; for here was not only actual notice of the settlement, but inducement to marry in consequence of it.

The conclusion from these cases, and from the principles which they lay down, appears to me to be, that the marriage of the daughter, in this case, changed the character of the previous settlement, and placed her in the light of a purchaser for a valuable consideration, and gave her preference to any subsequent purchaser. I shall, therefore, set aside the deed to *Verplank*, and make the same decree as in the former case.(a)

N. B. This decree was unanimously affirmed, on appeal to the court of errors, March 28th, 1815. [See 12 *Johns. Rep.* 536.]

(a) Vide *Atherly on Marriage and Family Settlements*, p. 178—198. who has examined, at large, the question, whether a voluntary settlement is fraudulent and void, under the 27 *Eliz.*, against a subsequent purchaser, merely from its being voluntary. He has taken a view of the subject somewhat new, and he concludes that, according to the true construction of the statute, a voluntary settlement, as such, is void against a subsequent purchaser for a valuable consideration, without notice, but not against a purchaser with notice. In the latter case, he holds the settlement to be valid.

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A memorandum, in writing, of the sale of lands, to be valid within the statute of frauds, must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty, that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof. Where an agreement is reduced to writing, all previous negotiations, resting in parol, are extinguished by the written contract, and cannot be resorted to, to help out or explain its meaning.

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A contract cannot rest partly in writing, and partly in parol; and where a part performance is set up to take a case out of the statute, the party is not allowed to resort to parol evidence in aid of the written agreement.

A part performance will not take a parol agreement out of the statute, unless the terms of the agreement distinctly appear, or are made out to the satisfaction of the court.

But where possession has been taken of land, and improvements made, under such imperfect agreement, though the court will not grant relief, on the ground of part performance, yet the bill will be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements.

THIS cause came on upon a petition for a rebearing.

The bill stated, that the plaintiffs, on the 7th of April, 1797, applied to the defendant, as proprietor of lands in the *Oriskany* patent, who agreed to sell, or lease to them, lot No. 4, in the second allotment of the patent, containing 740 acres; but he being then a tenant in common with the heirs of Mr. *Clark*, and no partition made, gave to the plaintiffs the following memorandum, in writing: "Messrs. *John Parkhurst, Frederick Parkhurst, and Abel Parkhurst*, have applied to me for leave to possess my lot, No. 4, in the second allotment of the *Oriskany* patent, which contains, by the late *James Cockburn's* survey, 740 acres; I have accordingly given them leave, and promised them, as soon as I can obtain a release from Mr. *Clark's* heirs for said lot, to give them the preference, either to purchase, or take a lease for said lot. April 7th, 1797."

That, subsequently to this agreement, for the further satisfaction of the plaintiffs, and to encourage them to make improvements on the land, the defendant further agreed, "that in case of a sale of the land, under the said agreement, the price should be the actual value, at the time of the contract, with interest up to the time of the conveyance, or the value, at the time of conveyance, computed as wild and unimproved land, at the election of the plaintiffs, the sale to be on as liberal credit as the plaintiffs could ask, on payment of interest annually; and in case of a lease of the premises, the same should be durable, or, in other words, a lease in fee, at the

usual and customary rents of the country." That, on making such contract, the plaintiffs entered on the premises, and commenced improvement thereof, and had cleared and brought under cultivation about 100 acres, with an orchard, two dwelling houses, barn, and other buildings, which had cost about 800 dollars. That a partition having been made of the said lands, between the defendant and the heirs of *Clark*, the plaintiffs applied to the defendant to perform his agreement, either by selling or leasing the premises to them. That the defendant suggested some new difficulty among the claimants to the land, which would suspend the execution of the agreement, which, however, he promised to perform as soon as he was enabled to do, and proposed to the occupants to take short leases, assuring them that, at the expiration thereof, he would perform his contract, by giving a deed or lease; and *G. W. F. Parkhurst*, one of the plaintiffs, accordingly received from the attorney of the defendant, a lease of the premises (except about 90 acres, before leased to *John Colter*) for three years, at the annual rent of 80 dollars: that he was further induced to accept the lease, by a letter from the defendant to his attorney, shown to the plaintiff, stating that the defendant was unable to make a permanent disposition of the lands, as the partition was not then complete; but that he expected that difficulty would soon be removed, when he should determine either to sell or give a permanent lease. That since giving the said lease, the defendant had recognised the original contract, and renewed his promise to fulfil it.

The plaintiffs remained in possession of the premises until the 14th of *December*, 1807, about 20 months after the expiration of the lease, when a demand was made of a surrender of the possession, under the penalty of paying double rent; and the defendant had since brought an action of ejectment to recover possession of the premises.

The bill prayed for a *specific execution* of the contract, and an injunction to stay the suit at law.

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The *answer* of the defendant stated, that the plaintiffs took possession of lot No. 4, in question, in or before the year 1796, without the knowledge or consent of the defendant, or any of the proprietors; that, in *April*, 1797, the plaintiffs applied to him for permission to remain on the lot, and desired to know whether he was willing to sell or lease the lot, and on what terms; and the defendant informed the plaintiffs, that, being only a tenant in common of the lot, he could not sell or lease it; but believing it for the benefit of the owners, that some person should be in possession to prevent waste, he told the plaintiffs they might continue in possession until a partition should be made, when, if he should be inclined to sell or lease, he would give a preference to the plaintiffs; and, at their request, he gave to the plaintiffs the written *memorandum* set forth in their bill; that when he promised the plaintiffs to sell or lease to them in preference, it was not understood by him, nor, he believed, by the plaintiffs, to be a lease in fee, or for any determined period. The defendant denied making the subsequent parol agreement, set forth by the plaintiffs, or any agreement whatever about the sale or lease of the premises, except what was contained in the written memorandum; that since the memorandum was delivered to the plaintiffs, he had never seen or written to them, or either of them, or written any letter relative to the subject, which he intended the plaintiffs, or either of them, should see.

That the plaintiffs, as appeared from a letter from them to the defendant, dated *August* 2, 1796, had entered on the land, and begun to make improvements, before the memorandum was delivered to them; and that he believed they were fully compensated for all their improvements, by the possession of the land, and the issues and profits, during the long period they had occupied it. That since the *memorandum* was given, no application had ever been made to him by the plaintiffs to execute any agreement, nor had he ever recognised, or promised to execute, the agreement, as set forthin

the bill. That a partition was made, but owing to the sickness of other parties, and other causes, the partition was not perfect, when, on the 27th of *February*, 1803, the defendant wrote the letter to his attorney at *Whitestown*, in which he mentions his expectation of getting a release from *Clark*, and that he "shall then determine either to sell or give permanent leases;" and he instructs his attorney "to inform the occupiers of the land, that it was the defendant's desire that they should take a lease for three years, under a moderate rent, and pay in the taxes, and covenant to surrender the same to the defendant at the expiration of the said term;" and that he enclosed a description of the lots, "and a list of those applicants to whom he gave permission to go on, many years ago, to hold the same during his pleasure, without any further consideration than to prevent waste," &c.

The answer further stated, that the defendant did not write the letter with the intention that it should be shown to the plaintiffs. That all the occupants, except the plaintiffs, and four others, combined not to accept leases, unless they were paid for their improvements, or had an agreement to sell to them at a reasonable price. The lease was accepted by the plaintiffs without any assurance from, or authorized by, the defendant, as to any agreement or contract, other than that stated in the memorandum; nor had the defendant acknowledged any other contract. That proceedings were instituted to remove the plaintiffs from possession, as stated in the bill, but no application had been made by the plaintiffs to the defendant, on the subject. That of the 740 acres of land mentioned in the memorandum, the defendant owned 291 acres in his own right, and 250 acres as executor, and no more: and the defendant pleaded and relied on the statute of frauds, by which the agreement set up by the plaintiffs, even if it had been admitted, would be void.

The bill was, afterwards, amended, so as to confine the plaintiff's claim to relief, to the lands actually owned by the defendant.

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1814. *G. W. F. Parkhurst*, in his letter to the defendant, dated
~~PARKHURST~~ April 3, 1808, said, that, "In regard to those lands he had
v. in possession that belong to the defendant, he and his brothers
~~VAN CORT-~~ would wish to have the whole he had taken a lease of. If
~~LANDT.~~ —— he could have a durable lease, he should be willing to give
a large rent; but if not agreeable to the defendant to lease,
he should be glad to have the preference of having it on the
best terms which the defendant can give. That he and his
father had laid out a good deal of property in clearing and
building on the defendant's land, and his parents were old,
and if they should be obliged to leave it, it would be hard
for them; *but we lie at your mercy to do with us as you think most proper.* If the defendant was inclined to sell
rather than lease, he would be glad to purchase, and make the
best payments he could," &c.

Benjamin Lawrence, a witness for the plaintiffs, stated,
that, on the 8th of July, 1793, the defendant gave him a
written "contract," to occupy and improve lot No. 4, which
stated that he was to hold the land *during the pleasure* of
the defendant, and was to have the preference, either to
purchase or take a lease when the defendant was legally
entitled to sell or lease. That, in October, 1793, the witness
assigned this contract to *G. W. F. Parkhurst*, for the bene-
fit of the *Parkhurst* family. The plaintiffs entered in April,
1794, and, in December following, the witness informed the
defendant of the assignment to them, and the defendant said he
would give a good title to the lot, as soon as he could obtain a
release from the heirs of *Clark*, either by a durable lease
on good terms, or by selling, as plaintiffs chose; that he only
wanted his *interest* annually; that the plaintiffs might go on,
and occupy, and improve, as if the lot was their own, and no
advantage should be taken of their labour, &c. The witness
was present when the plaintiffs gave up the contract which
had been assigned to them, and took the memorandum of the
7th of April, 1797; and the defendant then said he would
sell or lease, as soon as he obtained a release, &c. The wit-

ness did not think that the rents and profits would more than compensate for the improvements. *Simeon Parkhurst*, and *Richard H. Harrison*, confirmed the statement of *Lawrence*; several other witnesses were examined as to the value of the improvements, and of annual profits, &c.

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Gold, for the plaintiffs.

Harrison and *P. A. Jay*, contra.

THE CHANCELLOR. This is a suit for a specific performance of a contract to sell land.

The defendant, in his answer, denies any such agreement as is charged in the bill, and likewise insists upon the statute of frauds, as a defence against any parol agreement which might be made out.

The plaintiffs rely partly upon a parol agreement, and partly upon an agreement in writing, which is admitted to have been signed by the defendant. It is an agreement, or *memorandum*, dated the 7th of *April*, 1797, in which the defendant states, that the plaintiffs had applied to him for leave to possess lot No. 4. in the second allotment of the *Oriskany* patent, and that he had, accordingly, given them leave, and promised them, as soon as he could obtain a release from the heirs of *Clark*, of their interest in the lot, he would give the plaintiffs the preference, either to purchase or to take a lease for the lot.

1. The first question that properly arises in this case is, whether this *memorandum* contains, within itself, sufficient evidence of a valid agreement to take the case out of the statute, and to justify a decree for a specific performance.

The *memorandum* appears to be utterly defective. It ought to have stated the terms of the contract with reasonable certainty, so that the substance of it could be made to appear, and be understood from the writing itself, without having recourse to parol proof. This is the meaning of the

1814. statute, and without such the beneficial ends of it would be entirely defeated.

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If the *memorandum* is to be understood as promising to sell or lease to the plaintiffs at their election, yet the terms of such sale, or leasing, are omitted, and it is altogether uncertain to what extent, on what condition, or for what price, the parties meant to contract. Unless the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference contained in it, to something else, the writing is not a compliance with the statute. The cases to this point are decisive. In *Blagden v. Bradbear*, (12 Ves. 466.,) there was a bill for specific performance of an agreement for the purchase of land, and the *Master of the Rolls* observed, that an auctioneer's receipt may be a note or *memorandum* within the act ; but then the receipt must contain, in itself, or, by reference to something else, must show what the agreement was ; that one material particular did not appear in the receipt, viz. the price ; and the defendant, by insisting on the statute, had thrown it on the plaintiffs to show a complete written agreement, and the bill was dismissed. The omission to mention the price in a letter, acknowledging the contract to sell, was held by Lord *Hardwicke*, in *Clerk v. Wright*, (1 Atk. 12.,) to be a fatal omission, rendering the written evidence of the contract too defective to take it out of the statute. So, in *Clinton v. Cook*, (1 *Schoales & Lefroy*, 22.,) the bill was for specific performance of an agreement for a lease for three lives, and the written *memorandum* of the defendant omitted to mention the terms, or any term or time of duration of the lease, though it was made in consequence of an advertisement of the defendant, offering to lease the land for three lives. Lord *Redesdale* held, that the defendant was not bound to perform the contract, there being no evidence in writing of the terms to be devised, and there being no reference in the agreement to the advertisement. Again, in *Seagood v. Meale & Leonard*, (Prec. in Ch. 560.,) on a like bill, the

agreement in writing did not specify *the terms* of the purchase. It did not mention the sum, nor the way of disposal, nor to whom ; and all the danger of perjury would have been let in, to ascertain the agreement ; the bill was consequently dismissed. The same doctrine is contained in many other cases, as well at law as in equity ; (*Boydell v. Drummond*, 11 *East*, 142. *Tawney v. Crowther*, 3 *Bro.* 318. *Bailey & Bogert v. Ogden*, 3 *Johns. Rep.* 419. *Symondson v. Tweed*, *Prec. in Ch.* 374. *Gilb. Eq. Cas.* 35. *Bromley v. Jefferies*, 2 *Vern.* 415. *Underwood v. Hithcox*, 1 *Ves.* 279.) and I am warranted in considering it as a settled principle, that, if the court cannot ascertain, with reasonable certainty, the terms of the agreement, from the writing, or from some other paper to which it refers, the writing does not take the case out of the statute.

It appears to be equally well settled, that, when the agreement is thus defective, it cannot be supplied by parol proof, for that would be at once to open the door to perjury, and to introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent. The observations of the court, in the cases of *Clinan v. Cook*, and of *Boydell v. Drummond*, already cited or referred to, and the strong opinion of Mr. J. Buller, who presided for the Lord Chancellor, in *Brodie v. St. Paul*, (1 *Vesey*, jun. 326.,) are very conclusive upon this point, as far as authority might be wanting, in support of a principle so very clear and expedient, and which appears to have been uniformly admitted by the courts. (*Binstead v. Coleman*, *Bunb.* 65. *Lord H.*, in 2 *Atk.* 383.)

I consider, then, that the agreement of April, 1797, is too uncertain and too defective, as to the essential terms of the purchase, to authorize a decree for a specific performance. The court cannot, and ought not, to make bargains for parties, or to determine, in the case of a purchase, what one party ought to give and the other to take ; and, in the case of a lease, whether it ought to be for years, or for life or lives,

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1814. or in fee, and the amount of the rent, and whether payable in money or in produce, and in what periods. All this I must determine, if I undertake to carry this agreement into effect. It is not necessary, here, to insist on another material defect in the agreement, and that is, the want of mutuality; for if the defendant were bound to sell or lease, at the election of the plaintiffs, the plaintiffs were not bound to elect or to take either. It would be difficult to deduce any such obligation from the *memorandum*; and it seems to be very generally, and very properly, laid down in the books, that a court of equity will never decree performance where the remedy is not mutual, or one party only is bound by the agreement. (*Armiger v. Clarke*, *Bunb.* 111. *Troughton v. Troughton*, 1 *Ves.* 86. *Lawrenson v. Butler*, 1 *Schoale & Lefroy*, 13. *Bromley v. Jefferies*, 2 *Vern.* 415.)

The plaintiffs have gone into parol proof of negotiations and conversations prior to, and at the time of, the date of the agreement, to remove the ambiguity on the face of it, as to the meaning of the *preference* which was to be given, and also to ascertain, with some convenient certainty, the sense of the parties as to the terms of the purchase or lease. But I apprehend the rule to be too reasonable, and too well settled, to be now disturbed, that when an agreement is reduced to writing, all previous negotiations are resolved into the writing, as being the best evidence of the certainty of the agreement. Every thing before resting in parol, becomes thereby extinguished or discharged. (*Pasch.* 22 *Car. I. K. B.* cited in 5 *Viner*, 515. pl. 18. *Christmass v. Christmass*, *Trin.* 11 *G. I. in Ch.* cited in 5 *Viner*, 517. pl. 26. *Vandervoort v. Col. Ins. Com.* 2 *Caines*, 155. *Mumford v. M^r Pherson*, 1 *Johns. Rep.* 414.) It has been already observed, that parol proof cannot be resorted to, to supply what may be uncertain and defective in the writing. The note or *memorandum*, of *April*, 1797, is then to be laid out of the case, as being no compliance with the statute, and as forming, of itself, no ground for a specific performance.

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2. But the plaintiffs set up part performance to take the case out of the statute, and allege that this part performance consisted in delivery of possession, and in the beneficial improvements which the defendant encouraged the plaintiffs to make.

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In the first place, it is very questionable whether the plaintiffs are to be permitted, even in the case of part performance, to resort to parol proof, in explanation of, or as a substitute for, an existing written agreement. It would be against the principle which has just been stated. A contract cannot rest partly in writing, and partly in parol. The writing is the highest evidence of the agreement, and does away the necessity and the effect of parol evidence. To this purpose it was observed by Lord *Thurlow*, in *Irnham v. Child*, (1 Bro. 92.) that the rule was perfectly clear, that, where there was a deed in writing, it will admit of no contract that is not part of the deed; and that, whether it adds to, or deducts from the deed, it is impossible to introduce it on parol evidence. The point appeared to Lord *Redesdale* so repugnant to general principles, that he declared, in *Clinan v. Cook*, that, if there were part performance, he should have had great difficulty in letting in parol proof in aid of a written agreement.

But if the parol proof is to be let in, the same difficulty occurs that arose upon the *memorandum*, as to the uncertainty of the essential terms of the contract. There is no evidence of any price agreed on in case of a sale, or of any certain term, or rent, if a lease was to be preferred. And, if the court cannot execute the agreement even when in writing, if the terms of it be uncertain, the same reason and the same authorities apply, when the agreement, resting on parol evidence, is likewise uncertain. It is impossible to decree a specific performance in this case, whether we take the agreement from the writing, or from the parol proof, or from a combined view of both, without determining for the parties, if the plaintiffs elect to buy, the price, the credit, and the

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times of payment; and, if the plaintiffs elect to lease, the duration of the lease, the amount of rent, and when, where, and in what, payable. This would be going further than any of the cases will warrant. It would be taking from the parties their inherent and valuable right to make their own bargains, and we should appear to have forgotten the express words of the statute, that no *contract or sale of lands, or any interest therein, shall be valid, unless the agreement, or some note or memorandum thereof, be in writing, and signed by the party to be charged.*

The general language of the books is, that part performance will not take a parol agreement out of the statute, unless the terms of the agreement distinctly appear, or are made out to the satisfaction of the court. (*Amb.* 586. 1 *Ves.* 221. 2 *Schoale & Lefroy* 1. & 459. 3 *Atk.* 503. 6 *Ves.* 470—^{1.}, and the cases already cited.) I had occasion lately to consider this very point in the case of *Philips v. Thompson and others* ;* and it is, undoubtedly, the sound doctrine,

* *Ante p. 131.* and it is, sometimes, a case or *dictum* which seems to impair it. The ground of the relief in chancery, is the fraud in permitting a parol agreement to be partly executed, and in leading on a party to expend money in the melioration of the estate, and then to withdraw from the performance of the contract. (1 *Ves.* 221. 1 *Bro.* 417. 6 *Ves.* 27.) The courts of equity, in their anxiety to guard the party from the effects of fraud, have been led to some fluctuating decisions on this point of part performance; but the current of cases, both ancient and modern, is pretty uniform and consistent with the principle I have stated, and the tendency of the latter cases is to prefer giving the party *compensation in damages*, instead of a specific performance. Wherever damages will answer the purpose of indemnity, this alternative is to be preferred, as it will equally satisfy justice, and will be in coincidence with the provisions, and in support of the authority, of the statute. It was the observation of the Master of the Rolls, afterwards Lord *Alvanley*,

in the case of *Froster v. Hale*, (3 *Ves.* 713.,) that "the court had gone rather too far in permitting part performance, and other circumstances, to take a case out of the statute, Part performance may be evidence of some agreement, but of what, must be left to parol proof. The court ought not to have held it evidence of an unknown agreement, but to have had the money laid out, repaid. It ought to have been a compensation. It was very right to say the statute should not be an engine of fraud; therefore, compensation would have been very proper."

Other judges have felt and expressed the same sense of the inconvenient extent to which this doctrine of part performance has been carried. Under pretence of part execution, as Lord Redesdale observed, in *Lindsay v. Lynch*, (2 *Schoale & Lefroy*, 1.,) if possession is had in any way whatever, means are frequently found to oblige a court of equity to break through the statute of frauds; and he said it was a common expression at the Irish bar, that it had become a practice *to improve gentlemen out of their estates*. This same distinguished Chancellor was led to remark, in another case, *Harnett v. Yielding*, (2 *Schoale & Lefroy*, 549.,) that decrees for specific performance had been carried to an extent which tended to injustice. The original foundation of these decrees was, that damages at law were not an adequate compensation; and, if damages at law be commensurate with the injury, the court will not interfere. This was the doctrine as early as 1683, soon after the passing of the statute of frauds, in the cases of *Dean v. Izard*, and *Hollis v. Edwards*, (1 *Vern.* 159.) Those were bills for the execution of a parol agreement for a lease, and in confidence of which, the plaintiff had expended large sums on the premises. The statute of frauds was pleaded, and the *Lord Keeper* said, that the plaintiff, in each case, had a clear equity to be restored to the money expended for improvements, and he thought the bill would hold *so far*, as to be restored to the expenditures, and he directed an issue at law, to ascertain the damages.

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The uncertainty of the terms of the agreement is, then, of itself, an insuperable objection to the specific execution sought by the bill; and the compensation for improvements, which can be awarded under the authority of the court, affords to the party an adequate and a more suitable relief. Not only the case last cited, but the reasons and authorities contained in the recent decision, in *Phillips v. Thompson and others*, show that the court possesses ample jurisdiction over this question of compensation, and that, though other relief cannot be granted, the bill may be sustained for that purpose.

I have hitherto considered the case in the most favourable light for the plaintiffs, in respect to the evidence of a parol agreement; but there are written documents which tend strongly to overturn or destroy the weight of the parol proof, as to the existence of any agreement on the part of the defendant to sell, or permanently lease, the premises. I refer to the lease for three years, which the plaintiffs accepted, as late as the 1st *April*, 1803, and to the letter of *G. W. F. Parkhurst*, the principal plaintiff, of the date of 3d *April*, 1806, in which he offers to lease or purchase the land, on such terms as the defendant can afford, and admits the right to sell or lease, and the terms of either, to rest wholly in the discretion of the defendant. It is difficult to resist the impression which these documents are calculated to produce; and the letter of the 27th *February*, 1803, from the defendant to Mr. *Platt*, as mentioned in the pleadings, does not weaken that impression. That letter had no particular allusion to the parties in question, but to the *Oriskany* lots in general: and it is evidence, as far as it goes, that the defendant intended to reserve to himself the right to determine, whether to sell or lease, and upon what terms.

The most that can be said in favour of the plaintiffs' case is, that as the defendant, by his *memorandum*, in 1797, encouraged the plaintiffs to possess and improve the lot, under some vague assurance that he would, eventually, lease or sell to them, he ought not now to avail himself of the bene-

fit of their improvements, without making them compensation.

The uncultivated state of most part of the land, when the defendant first gave sanction to the possession of the plaintiffs, and the uncertainty, at least, of any redress at law for their improvements, are additional considerations for retaining the bill; and in this view, perfect justice can be done to both parties, consistent with the principles of equity and law.

I shall accordingly correct the decree heretofore pronounced in this case, and shall direct a reference to a master, to take and state an account between the parties; and that, in taking the same, he charge the plaintiffs with the rent, if any, in arrear, and with what shall appear to be a reasonable rent for the time the same was not agreed on by the parties; and that he make to the plaintiffs a reasonable allowance for beneficial and lasting improvements made by them upon the land; (a) and that he take the necessary proofs for that purpose, and report with convenient speed; and that all other questions be, in the mean time, reserved.

"It is ordered, that the former order made in this cause, on the 20th of *December* last, and the other orders and decree made in the cause, subsequent to the day last aforesaid, and previous to the order for rehearing, be set aside. And it is further ordered, that it be referred to *Walter King*, Esq., one of the masters of this court, residing in *Oneida* county, to take and state an account between the parties; and that, in taking the same, he be directed to charge the plaintiffs with the rent, if any, in arrear, and for such time as the rent was not agreed on by the parties, that he charge the plaintiffs with what shall appear to be a reasonable rent; and that he be directed to make the plaintiffs a reasonable allowance for beneficial and lasting improvements

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(a) See a similar order, 2 *Schoale & Lefroy*, 513.

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made by them upon the premises ; and that, in taking such account, the depositions and exhibits in the cause may be used by the parties ; and that they be at liberty to produce other proof, which the master, in that case, is to return with his report. And all further questions to be reserved, until the coming in of the report.”



October 3d.

FROST AND OTHERS *against* BEEKMAN.

Where a deed was deposited by the grantor with W., as an *escrow*, to be delivered to the grantee, on his producing a mortgage executed and recorded, and a certificate of the clerk of no encumbrances on record, and W., on receiving the mortgage and certificate of registry, &c. delivered the deed to the grantee, and the grantor received the mortgage, &c., from W., and treated it, afterwards, as a valid mortgage ; he was held to be concluded from denying the delivery of the deed; on the ground that the wife of the mortgagor had not acknowledged the mortgage, and that the mortgage was erroneously registered for less than the true sum.

A deed, delivered as an *escrow*, takes effect only from the time of the performance of the condition, and the actual delivery to the grantee ; except in cases where a relation back to the first delivery is necessary to give effect to the deed, or to the intermediate conveyances of the grantee ; but not as between third persons.

The registry of a mortgage, given to secure three thousand dollars, but, by the mistake of the clerk, registered for three hundred dollars, is notice to subsequent *bona fide* purchasers, to the extent only of the sum expressed in the registry.

But *actual* notice of the *true sum* contained in the mortgage, is sufficient, as to all purchasers, or payments, subsequent to the time of such notice.

A party claiming relief in equity as a *bona fide* purchaser, must, positively and precisely, deny all notice, though it is not charged.

THE bill in this cause, which was filed in April, 1808, stated, that *Frost*, one of the plaintiffs, and *Martin Goddard*, then deceased, in August, 1803, agreed to purchase of *Henry Corl*, jun., lot No. 33, in the town of *Marcellus*, containing 600 acres ; that, on the 19th of September, 1803.

Curl conveyed 200 acres, part of the lot, to *Frost*, for which *Frost* paid him, in *August*, 1803, 300 dollars, and, on receiving the deed, 700 dollars more; that *Curl*, in *September*, 1805, pursuant to the agreement, conveyed half of the residue of the lot to *Frost*, and half to *Martin Goddard*, and the deeds were duly recorded the 15th of *September*, 1807. On receiving the last mentioned deeds, *Frost* and *Martin Goddard* gave their promissory notes to *Curl*, for the purchase money, and which notes *Curl* assigned to others. In *September*, 1807, *Frost* sold the 200 acres of land, first conveyed to him, to *Jesse Kellogg*, one of the plaintiffs; and *Martin Goddard* sold and conveyed his interest in the lot to *Eli Goddard* and *Philo Goddard*, two of the plaintiffs. That the plaintiffs discovered on the records, in the office of the clerk of the county of *Onondaga*, a mortgage from *Curl* to *John K. Brekman*, the defendant, dated *May 6th*, 1803, registered the 9th of *September*, 1805, to secure the sum of 300 dollars, payable on the 6th of *May*, 1808, with interest; on discovery of which mortgage, *Frost* applied to the defendant, and offered to pay the sum of 300 dollars, and interest, which was refused; and to the surprise of *Frost*, the defendant stated the mortgage in fact to be to secure the sum of 3,000 dollars, which sum he demanded, saying there was a mistake in the registry as to the sum. That *Frost* had no knowledge or suspicion of the mortgage, at the time of the delivery of either of the deeds from *Curl* to him; nor had, as he believed, *Martin Goddard* any knowledge of it at the time of the delivery of the deed to him; and that *Frost* and *Martin Goddard* have sold and conveyed the lands as aforesaid, without any knowledge or suspicion of any other mortgage, than one for 300 dollars. That the interest of the plaintiffs ought not, therefore, to be affected by the mortgage beyond the sum of 300 dollars expressed in the registry; that valuable improvements have been made on the lot, since the purchase from *Curl*; that the defendant is advertising the lot for sale under the mort-

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gage, for the purpose of raising the sum of 3,000 dollars, &c. And the plaintiffs prayed an injunction to stay all further proceedings on the part of the defendant, &c.

The *answer* of the defendant stated, that, in *May*, 1803, he had a good title to the lot in question, which he agreed to sell on the 6th of *May*, 1803, to *Corl*, for 3,000 dollars, payable the 6th of *May*, 1808, with interest. The agreement was by *parol*; but the defendant promised to execute a deed, and sent it to *R. Westerlo*, of *Albany*, as an *escrow*, to be delivered to *Corl* when he should produce to *Westerlo* a mortgage of the lot, to secure the purchase money, duly executed by him and his wife, and registered according to law, and a certificate of the clerk that there was no other mortgage on the lot registered. That the defendant, accordingly, on or about the 6th of *May*, 1803, signed and sealed a deed for the lot to *Corl*, who, at the same time, drew a mortgage to be executed by *Corl* and wife, which was approved of by the defendant; and the defendant deposited his deed with *Westerlo*, as an *escrow*, to be delivered to *Corl* on his producing the *mortgage* and certificate as aforesaid. That, in *September*, 1805, as the defendant was informed by *Westerlo*, *Corl* produced, and delivered to *Westerlo*, a certificate of the clerk of *Onondaga*, dated *September* 9th, 1805, that there was no mortgage of the premises on registry in this office, and that *Corl* had left in his office, that day, a mortgage executed by him and his wife, to *Beekman*, for the premises, to secure the payment of 3,000 dollars, &c. That, shortly after, *Corl* delivered to *Westerlo* the mortgage, for securing the sum of 3,000 dollars, dated the 6th of *May*, 1803, purporting to be executed by *Corl* and his wife, acknowledged by *Corl* the 7th of *September*, 1805, and registered the 9th of *September*, 1805; and that *Westerlo*, on receiving the mortgage and certificate, delivered up the deed of the defendant to *Corl*; but the defendant insisted that such delivery was not valid, because the conditions, on which the deed was to be delivered, were not per-

formed by *Corl*, as the mortgage, though purporting to be signed by the wife of *Corl*, had not been acknowledged by her. That *Corl* having absconded long before the day of payment, and no person appearing to satisfy the mortgage, the defendant caused the lot to be advertised for sale under the power contained in the mortgage; that the defendant had no knowledge of the facts stated in the bill; that in September, 1807, he first discovered that the clerk, in registering the mortgage, had inserted 300 instead of 3,000 dollars; and he charged, that the plaintiff purchased without any reference to the registry; and that he hoped to prove, that the plaintiff and *Martin Goddard* had previous notice of the mortgage, &c.

The defendant admitted that improvements had been made on the lot, but to what extent or value he was ignorant.

It was proved, on the part of the plaintiff, that *Corl* absconded in the summer or autumn of 1803, and that his wife died in July or August, 1806. The sale of the lot to *Frost* and *Martin Goddard*, by *Corl*, as stated in the bill, was proved. One of the witnesses, *Samuel Whitney*, stated, that in September, 1807, he discovered the mortgage of the defendant on record, and communicated the fact to the ~~sons~~ of *M. Goddard*, which he believed was the first notice ~~Frost~~ or *Goddard* had of it. Two other witnesses, *Russel Taylor* and *Nathan Healy*, stated, that the deeds from *Corl*, to *Frost* and *Goddard*, were given in September, 1806, when the articles of agreement for the same land were given up to *Corl*. *Frost* gave two notes, of 420 dollars each, to *Corl*, who had given a receipt for 130 dollars paid before, and, in February, 1806, *Corl* received 140 dollars.

Rufus Lawrence stated, that he paid *Corl*, for *Martin Goddard*, at two different times, 460 dollars, and *Goddard* also gave *Corl* a note for 300 dollars. The notes of *Frost* and *Goddard*, to the amount of 700 dollars, were, afterwards, seen in the hands of *Matthew Trotter*, to whom they had been assigned, and who gave them up to *Frost* and *Martin*.

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Goddard, and took new notes, payable to himself, for the same amount. It appeared that the deed from *Corl* to *Frost*, for 200 acres, was dated *September 19, 1803*, for the consideration of 1,000 dollars, acknowledged the 11th of *April*, 1805, and recorded *July 3, 1805*; and the deed for 207 1-2 acres, from *Corl* to *Frost*, was dated *September 1, 1805*, acknowledged the 13th of *September, 1806*, and the 15th of *September, 1807*, for the consideration of 1,000 dollars; and the deed to *Martin Goddard* was acknowledged and recorded at the same time. The deed from *Frost* to *Kellogg*, of 200 acres, for the consideration of 2,000 dollars, was dated the 21st of *September, 1807*, and acknowledged and recorded on the same day. There was also a deed from *Kellogg* to *Frost*, dated the 6th of *July, 1808*, for 200 acres, for the consideration of 2,000 dollars, acknowledged on the 7th of *July, 1808*, and recorded the 13th of *May, 1809*. The deed from *Martin Goddard* to *Philo Goddard* was dated the 24th of *November, 1807*, for 50 acres, for the consideration of 400 dollars, but was not recorded; and the deed from *Martin Goddard* to *Eli Goddard*, was for 100 acres, dated also the 24th of *November, 1807*, for the consideration of 700 dollars.

It appeared, also, from the exhibits, that the deed from *Beekman* to *Corl* was dated the 5th of *May, 1803*, acknowledged the 11th of *December, 1804*, and recorded the 15th of *September, 1806*; and that the mortgage, from *Corl* to *Beekman*, was dated the 6th of *May, 1803*, acknowledged the 7th of *September, 1805*, and recorded the 9th of *September, 1805*.

It was proved that valuable improvements had been made by the plaintiffs on the land. One witness stated the value of them to be 2,891 dollars.

Westerlo, who was a witness for the defendant, deposed, that, in *October, 1804*, he received a letter from the defendant, dated 26th of *September, 1804*, in which the defendant says, he sends therewith the deed, bond, and mortgage, of *Corl*, the first executed by the defendant, and to be de-

livered to *Corl*, provided he pays the balance, &c., and has the mortgage, *after executing it, put on record in Onondaga*, and brings the clerk's certificate that there was no mortgage or encumbrance thereon. That the witness delivered to *Corl* the deed, on his producing the mortgage and certificate, which was some time after the witness received the deed, but the exact time he could not recollect. That the certificate of the clerk was dated the 9th of *September*, 1805, and the certificate of the registry of the mortgage was of the same date; and the acknowledgment of *Corl*, of the mortgage, was on the 7th of *September*, 1805.

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Gold, for the plaintiffs, contended, that the only legal evidence of the conditions to be performed by *Corl*, before the deed was to be delivered to him, was the letter of the defendant to *Westerlo*, and that it did not expressly require the acknowledgment of the mortgage by the wife of *Corl*. The conditions were satisfied by the delivery of the mortgage and certificate to *Westerlo*. Besides, the acceptance, by the defendant, of the mortgage, and his acquiescence therein for so long a time, and advertising the premises for sale under the mortgage, amounted to an adoption and ratification of the construction given by *Westerlo* to the letter, and of his acts in pursuance of it, so that the defendant was *estopped* from making any objection to the due delivery of the deed to *Corl*. And, especially, since the death of Mrs. *Corl*, in *August*, 1806, the possibility of any claim of dower was removed, so that the defendant could not be prejudiced by the omission of her acknowledgment.

Again, the conditions on which the deed to *Corl* was deposited with *Westerlo*, having been performed, and the deed delivered to *Corl*, the title to the land vested in him, by relation, from the date of the deed, so as to support the intermediate sales by *Corl* to *Frost* and *Goddard*; but even if it should be considered as taking effect only from the time of the delivery by *Westerlo* to *Corl*, it would still enure to support the previous sales to *Frost* and *Goddard*. (1 Johns.

1814. Cas. 81. *Shep. TTouchst.* 56, 57, 58. 4 *Cruise's Dig.*
 FROST tit. 32. ch. 11. sect. 55. 1 *Term Rep.* 600. Sir W.
 v. *Jones*, 459. 1 *Ld. Raym.* 729. 10 *Vin. Ab.* 360. pl. 7.
Beekman. *Str. 818.* 4 *Johns. Rep.* 230.)

The mortgage of the defendant was not *duly registered*, and it can operate as notice only so far as it was registered. The act (*i. N. R. L.* 372.) expressly provides, "that no mortgage, nor any deed, conveyance, or writing, in nature of a mortgage, shall defeat or prejudice the title or interest of any *bona fide* purchase of any lands, &c., unless the same shall have been *duly registered as aforesaid*;" and, in the previous section, (s. 1,) the register is required to enter the names of the mortgagors and mortgagees, the dates of the mortgages, the mortgage money, time of payment, description of lands mortgaged," &c. The registry act would operate as a snare to purchasers, if an erroneous registry was to be regarded as *notice* of the *true* deed. No purchaser would ever think of looking further than the record for the sum for which the mortgage was given. (1 *Schoale & Lefroy's Rep.* 130. 156. *Amb.* 678. 2 *Equ. Cas. Abr.* 609. *Sugden's L. of V.* 467. 469, 470. 2 *Schoale & Lefroy*, 64. *Newland on Cont.* 509. 3 *Cruise's Dig.* 348. tit. 32. *Deed*, c. 21. s. 11. *Str. 1064.* 4 *Vesey*, 389. 1 *Caines' Cases in Error*, 120, *Per SPENCER, J.*)

Bona fide purchasers for a valuable consideration, are especially protected in this court, particularly against latent equities.

Emott, contra, insisted, that there had been no valid delivery of the deed from *Beekman* to *Corl.* There was no acknowledgment of it by the wife, and, until every condition was fully performed, there could be no delivery. (*Shep. TTouchst.* 59. *Perkins*, s. 142. 4 *Com. Dig.* 159.)

If the mortgage was not duly registered, then the condition was not performed. If it was duly registered, then there was *notice*; so that, *quacunque via data*, the plaintiffs

have no equitable title to relief. *Estopells* are odious, and there is no *estoppel* in this case.

If there was any delivery of the deed, it was after the 9th of September, 1805. There was no need of any registry, as respected the original purchasers, who purchased before the existence of the mortgage.

The doctrine of *relation* is for the protection of *right*, and is never allowed to the injury of third persons. (3 Co. 35. b. 36. a.) A delivery is never made to have retrospect to the date of the deed, so as to work a wrong to innocent purchasers. There can be no such relation back as to collateral acts. It must, in many cases, be absurd to apply this doctrine of relation to an *escrow*.

The registry, in this case, was sufficient notice to all subsequent purchasers. (2 Johns. Rep. 510. 10 Johns. Rep. 374. 2 Vesey, 441. 13 Vesey, 120. 14 Vesey, 433.)

A notice is sufficient, before the execution of the deed to the purchaser. (2 Atk. 632.) So, it is sufficient, if before the money is paid. (2 Atk. 630. 3 Atk. 304. 3 P. Wms. 306.)

Again, though notice is not charged, yet it must be expressly denied by the purchaser. The plaintiffs, in their Bill, ought to have explicitly negatived all notice at the time the deeds to them were executed, or when they paid the money. (1 Vern. 179. 3 P. Wms. 244.) The plaintiffs have not denied notice, nor shown a want of notice by their proofs.

The fact of improvements made, has no application to this case. The defendant wants only his money, and the court ought to direct that the 3,000 dollars be paid in a reasonable time, or the equity of redemption be foreclosed.

Frost gave notes to *Corl*, and there is no proof that the purchase money has ever been paid.

The witnesses, *Healy* and *Cole*, show their interest, and their depositions ought, therefore to be rejected. The whole proofs show that *Kellogg* never paid the 2,000 dol-

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lars for the purchase. At any rate, he had notice of the mortgage before payment, and that is sufficient as to him.

 THE CHANCELLOR. This case has led to the discussion of several important questions.

1. The first in order is, whether the deed from *BEEKMAN* to *Corl* was duly delivered, and at what time, so as to pass the estate.

The deed must be taken to have been duly delivered from the time it was handed to *Corl* by *Westerlo*, with whom it had been deposited as an *escrow*. The exact time of this delivery does not appear, but it may be safely fixed as early as the 1st of *October*, 1805, for it must have been after, and shortly after, the registry of the mortgage on the 9th of *September* preceding. The letter from *BEEKMAN* to *Westerlo*, containing the conditions, upon the fulfilment of which the deed was to be delivered, did not expressly, or by any necessary intendment, require that the mortgage should have been previously executed by *Corl's* wife. It mentioned only, that *Corl* was to have "the mortgage (after executing it and the bond) put on record." The agent of the defendant accepted of the mortgage as sufficient, without such acknowledgment, and the defendant afterwards received the mortgage from *Westerlo* without objection, though the want of acknowledgment by *Corl's* wife must have appeared from the mortgage itself. The wife died in the summer of 1806, and the defendant cannot be permitted, under the circumstances of the case, to question the validity of the delivery on the ground that the wife was not a party to the mortgage. Nor can he be heard to say, that the mortgage was not "put on record," so as to defeat the delivery of the deed. The clerk's certificate of the registry was all that the letter to *Westerlo* could have intended. It was not expected that the agent would go into the county of *Onondaga* to inspect the registry himself. The certificate upon the mortgage was accepted by *Westerlo*, and from him by

by the defendant, as sufficient evidence of the registry. The defendant has thus affirmed the delivery of the deed, by accepting the mortgage, with the evidence accompanying it of a performance of the conditions on which the delivery of the deed was made to depend. He ought to be concluded from denying the delivery, especially as against third persons who have acquired interests under it; and this conclusion is the more just and necessary, when we consider that the defendant has never ceased, even since the discovery of the mistake in the registry, to treat the mortgage as valid.

Every deed takes effect from the delivery; and the reasonable inference from the transaction, is to consider the deed as operating only from the time of the performance of the condition, and the actual delivery to the grantee. This is the general rule, as stated by *Perkins*, (sect. 138.,) and it is only to be controverted when justice requires a resort to fiction. In *Butler and Baker's case*, (3 Co. 35. b. 36. a.) it was resolved, and the law had, indeed, been so understood long before, (*Bro. tit. non est factum*, pl. 5.,) that a deed delivered as an escrow, and afterwards to the grantee, shall relate back to the first delivery, when that relation is necessary to give effect to the deed, as if the grantor, being a *feme sole*, should marry, or if the grantor, whether a *feme sole* or not, should die between the first and second delivery; but, that in other cases, as where it would avoid a lease, it shall not have that relation, but shall operate according to the truth of the case from the second delivery. The fiction of carrying the deed back by relation, is resorted to from necessity, to prevent injury, and to uphold the deed; or, as it is expressed in the case from *Coke*, "in such case for necessity, and *ut res magis valat quam pereat*, to this intent, by fiction of law, it shall be a deed *ab initio*, and yet in truth, it was not his deed until the second delivery." In that case it was likewise resolved that, as to collateral acts, there should be no such relation at all.

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In the present case, there is no necessity of resorting to this fiction of relation, as between the parties to the bill. It would operate unjustly upon the defendant, for it would be defeating his mortgage altogether, so far as respected the first deed from *Corl* to *Frost*, which was recorded in *July, 1805*. If the question was between *Corl* and the persons to whom he sold, the deed ought to relate back, so as to give effect to his intermediate grants, and prevent him from defeating them. This is the amount of the doctrine in *Jackson v. Bull*, (1 *Johns. Cas.* 81.) But here is a struggle between innocent persons, to avoid a loss, and we ought not to resort to fiction to help one as against the other. The transaction must be left to rest upon its simple and naked truth.

I conclude, then, that the deed to *Corl* took effect from its delivery to him, about the 1st of *October, 1805*.

Another and a more interesting question, is respecting the extent and effect of the registry of the defendant's mortgage, as notice to purchasers. It was a mortgage for 3,000 dollars, and, by mistake, the registry was only for 300 dollars. This mistake is the whole cause of the controversy.

The registry of a mortgage is notice to subsequent purchasers. The mortgage act of the sess. 24. ch. 156., declared, among other things, that the registry of a mortgage should contain, not, indeed, the mortgage at large, but the essential parts of the mortgage, and among other specified parts, "the mortgage money, and the time, or times, when payable." To this register all persons whomsoever, at proper seasons, are at liberty to have recourse; and the act declared that mortgages were to have preference, as to each other, according to the times of registry, and that "no mortgage should defeat or prejudge the title of any bona fide purchaser, unless the same should have been duly registered, as aforesaid." This registry is notice of the mortgage to all subsequent purchasers and mortgagees; and so the act was construed, and the law declared, by the court of errors, in the case of *Johnson v. Stagg*, (2 *Johns. Rep.* 510.)

The English authorities on this point do not, therefore, govern the case. The language of those authorities, undoubtedly, is, that the registry is not notice, though that doctrine is much questioned, and the point seems still to be floating and unsettled. (*Bedford v. Backhouse*, 3 *Eq. Cas. Abr.* 615. pl. 12. *Wrightson v. Hudson*, *Ib.* 609. pl. 7. *Morecock v. Dickins*, *Amb.* 678. *Latouche v. Dunsany*, 1 *Schoale & Lefroy*, 157. *Sugden*, (3d. *Lond. ed.*) 524—7., *Com. Dig.* tit. 32. *Deed*, ch. 21. s. 11.) The only question with us is, when, and to what extent, is the registry notice? Is it notice of a mortgage unduly registered? or is it notice beyond the contents of the registry?

The true construction of the act appears to be, that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended that as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser, of the existence of a lease, is notice of its contents. (*Taylor v. Stibbert*, 2 *Ves. jun.* 437. *Hiern v. Mill*, 13 *Ves. jun.* 118. 120. *Hall v. Smith*, 14 *Ves. jun.* 426.) In that case, the

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The registry  
of a mortgage  
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party is put upon inquiry, and he must make it, or abide the consequences. The decision, in *Jackson v. Neely*, (10 Johns. Rep. 374,) was made upon the same principle; and it was held that the recital in a deed of a letter of attorney, by which it was made, was notice to the purchaser of the existence of such a power. But here the statute did not mean to put the party upon further inquiry. The registry was intended to contain, within itself, all the knowledge of the mortgage requisite for the purchaser's safety.

An unauthorized registry of a mortgage, or one registered without any previous proof or acknowledgment, would not, it seems, be notice to a subsequent purchaser.

The question does not necessarily arise, in this case, how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof, or acknowledgement, would charge a purchaser with notice of the mortgage.

The better opinion, in the books, seems to be, that it would not be notice, and that equity will not interfere in favour of an encumbrancer, when he has not seen that his mortgage was duly registered. (*Sugden's Law of Vend.* 527. 1 *Schoale & Lefroy*, 157. *Hicester v. Fortner*, 2 *Binney*, 40.) But here every thing was done that could have been previously required of the mortgagee. The mortgage was duly presented for registry, and he was not bound to inspect and correct the record. This was the exclusive business and duty of the clerk, and there is no reason why the registry should not operate as notice, to the amount of the sum mentioned therein; and, indeed, so far the obligation of the registry is admitted by the bill.

I conclude, therefore, that the registry was notice to purchasers, to the amount, and only to the amount, of the sum specified in the registry.

We are next led to consider how far relief can be granted to the defendant consistently with these principles.

Equity gives no assistance against a purchaser for a valuable consideration, without notice.

Whatever claims the defendant may have to favour, arising from the misfortune attending his case, yet it is an established rule, in equity, to give no assistance against a purchaser for a valuable consideration, without notice. (*Wallwyn v. Lee*, 9 *Ves.* 24.) He has equal claims upon the equity of

the court. But, whenever actual notice of the true sum in the mortgage can be brought home to the purchaser, he is from that time, so far as the former purchase is left incomplete, either as to the deed on the one hand, or as to payments on the other, bound by the prior equitable lien, and all subsequent payments, by him, are made in his own wrong, so far as the rights of the mortgagee are concerned. As soon as notice is received, it arrests all further proceedings towards the completion of the purchase and payment, and, if persisted in, they are held to be done in fraud of the equitable encumbrance. (*Wigg v. Wigg*, 1 *Atk.* 384. *Story v. Lord Windsor*, 2 *Atk.* 630.) Thus, in *Tourville v. Naish*, (3 *P. Wms.* 306.,) it was held, that where a man purchases an estate, and pays part, and gives a bond for the residue, notice of an equitable encumbrance, before payment, though after the giving of the bond, was sufficient to stop payment, and to entitle the obligor to relief, in equity, against the bond. Again, in *Hardingham v. Nicholls*, (3 *Atk.* 304.,) it was ruled to the same effect, that, if the purchaser for a valuable consideration had not paid the money when notice of the lien was received, though it was secured to be paid, the plea of such a purchase was not good against the plaintiff's title. There can be no doubt as to the rule of equity in this case, and the only difficulty is, to determine from what time the plaintiffs are to be charged with notice of the mistake in the registry of the mortgage.

*Frost* and *M. Goddard* are to be treated as *bona fide* purchasers, without notice. It is so averred in the bill, and there is no proof to contradict it. The last deeds from *Cort* to them, though bearing date in September, 1805, were acknowledged in September, 1806, and are proved by the witnesses on the part of the plaintiffs, (*Healy and Taylor*,) to have been executed in September, 1806. At that time, as *Frost* avers, they had no notice, in fact, of the registry, though they were chargeable with notice, in law; and when the notice, in fact, not only of the registry, but of the

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Notice of an  
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mistake in the registry, came to their knowledge, is left to be inferred from circumstances. They have not thought proper to disclose the precise time, and the obscurity in which this fact is left by the plaintiffs, authorizes the presumption that they may have known it sooner than they are willing to declare. The bill does not state at what time the discovery was made of the registry, but only that, "on such discovery," *Frost* applied to the defendant, to pay him the 300 dollars, and was then first informed of the mistake. One of the witnesses (*Whitney*) would lead us to conclude that the first actual knowledge which the parties had of the registry was in *September*, 1807; and it was in *September*, and *November*, 1807, as appears by the acknowledgments upon the deeds, that *Frost* and *Martin Goddard* sold to the other plaintiffs. I think that actual notice of the true mortgage ought to be fixed on *Frost* and *Martin Goddard*, as early, at least, as *September*, 1807. The purchasers from them, who are the other plaintiffs in the bill, make no averment of being *bona fide* purchasers, without notice of the true mortgage. They are perfectly silent on the fact of notice, and the bill is rather equivocal on this point, even as to *Frost*. He only says, that he and *Martin Goddard* alienated "without any knowledge or suspicion of any encumbrance, except the mortgage registered as aforesaid." In all cases in which a party sets up his title to relief in equity, as a *bona fide* purchaser, he must deny notice, though it be not charged. (3 P. Wms. 244. n. *Bodman v. Van Den Bendy*, 1 Vern. 179.) It is a general rule in pleading, that whatever is essential to the right of the party, and is necessarily within his knowledge, must be positively and precisely alleged; and the plaintiffs coming in the character of *bona fide* purchasers, were bound to state, affirmatively, the equity of their case; if they will not aver the fact, that they were purchasers without notice, we are not bound to presume it. The fact rests in their own knowledge. In *Gerard v. Saunders*, (2 Ves. jun. 454.,

the defendant pleaded a purchase for a valuable consideration, without notice ; and Lord *Loughborough* held, that he was bound to deny, fully, and in the most precise terms, every circumstance from whence notice could be inferred.

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One of the deeds to *Frost*, for 200 acres, was dated in 1803, and recorded in 1805, prior to the mortgage ; and whatever payments were made upon that purchase before *Frost* was chargeable with notice of the true mortgage, though made prior to the time of the delivery of the defendant's deed to *Corl*, ought equally, with subsequent payments, to be protected against any further sum than that contained in the registry of the mortgage. *Frost* cannot be in a worse situation by paying money before *Corl's* title was perfected, than if he had paid it immediately after. As a *bona fide* purchaser without notice, and so long as that character is preserved, he is not bound beyond the sum in the registered mortgage ; and though no prior transaction between *Corl* and him could gain a preference over the mortgage *as registered*, because *Corl* had no title until the delivery of the deed to him, in consequence of that registry, yet, when the delivery took place, the prior deed to *Frost*, and the prior record of it, operated, instantly, so as to protect *Frost's* title *from that time*, and to render him a *bona fide* purchaser, except as to the registered mortgage. It follows, of course, that all prior payments made by him, became equally effectual, subject to the same limitation. A contrary rule would work odious injustice.

The subject of the payments requires this further explanation : and payments to the endorsee or assignee of *Corl*, before notice, are the same as payments to him ; and if any part of the debt created by the purchasers, or either of them, had been duly transferred, so as to vest the interest in the assignee ; and if either *Frost* or *Goddard*, before notice, had changed the debt in the hands of the assignee, by giving new notes or obligations to the *bona fide* holder, he ought to be allowed for this as payment, because he has extin-

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guished so much of the old debt, and become absolutely bound to the new creditor.

I shall, accordingly, direct a reference to a master, to state an account upon these principles, and to report what may have remained due from *Frost* and *Goddard*, on the 1st of October, 1807; and whatever that balance may be, it is justly subject to the defendant's mortgage, and must be appropriated in part satisfaction of it before the land can be relieved.

"Ordered, adjudged, and decreed, that it be referred to one of the masters of this court, residing in the county of Onondaga, to ascertain and report what sum, or sums of money, were actually paid to *Henry Corl*, or to his endorsee, or assignee, duly authorized to receive the same, by *Josiah Frost*, and *Martin Goddard*, respectively, before the first day of October, 1807, on any purchases mentioned in the pleadings in this cause, and made by them, or either of them, from him, prior to that date, of lands in lot No. 33., in the township of *Marcellus*; and that the master distinguish between such payments as were made for principal, and such payments as were made for interest. That he also ascertain, and report specially, whether any, and what part of the debts arising on such purchases, were transferred by *Henry Corl*, for a valuable consideration, and were discharged in the hands of the *bona fide* holder, prior to that period, by *Josiah Frost* and *Martin Goddard*, or either of them, by new notes or obligations: or, if not discharged, of which they had received notice from the assignee before that period. And the master is further directed to state an account of the moneys due on the respective purchases, for principal and interest, after deducting the payments which may have been made, and the parts of the debts discharged or assigned, with notice as aforesaid. And the master is further ordered and directed, to ascertain and report the amount of the principal and interest due on the mortgage

given by *Henry Corl* to the defendant, according to the true sum mentioned in the mortgage, and, also, according to the sum mentioned in the registry thereof; and in taking the accounts aforesaid, the depositions and exhibits in the cause may be used by the parties; and they are to be at liberty to produce further proof, which the master is also to report; and all further questions are in the mean time reserved."

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MAJESTRE.

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LONG against E. L. MAJESTRE, (*Administratrix of Wm. Majestre, deceased,*) AND TARDY.

A creditor filing a bill against an *executor*, cannot make a debtor of the estate a party, except where the executor is insolvent, or there is collusion between the executor and debtor, or in some other special case.

As where A. and B. carried on trade, as partners, with the funds of A., in the name of B., and, without any dissolution of the partnership, or rendering any account to A., B. afterwards, without the consent of A., entered into a partnership with C., and carried into the new concern all the funds of the former partnership; and A., on the death of B., filed a bill against his administratrix, and C., his surviving partner, for a discovery and account; and C. demurred to so much of the bill as sought an account from him of the transactions and profits of the partnership between him and the intestate, and of the personal estate of the intestate in his hands: the demurrrer was overruled.

THE plaintiff stated in his bill a large claim against the estate of *William Majestre*, deceased, and alleged, that being a merchant at *Marselles*, in *France*, he entered into partnership with the intestate, who was a merchant in *New-York*, in the year 1807; that the intestate brought no funds into the capital of the house, but carried on trade solely with the funds of the plaintiff, and in his own name, but for the partnership account, but had rendered no account to the plaintiff; and had, without the consent of the plaintiff, or any dissolution of their copartnership, afterwards, entered

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into partnership with the defendant, *Tardy*, and had carried all the funds of the plaintiff, in his hands, into the last co-partnership, and used them therein, until his death, in 1814; and the plaintiff, therefore, claimed to be entitled to the whole share of the intestate in the last partnership. The bill also alleged, that a great part of the personal estate of the intestate had come into the hands of *Tardy*, and, among other things, prayed that *Tardy* might be compelled to set forth a full and true account of the partnership transactions between him and the intestate, and of the profits, &c.; and that he might set forth and declare whether the intestate did not leave a considerable personal estate in his hands.

The defendant, *Tardy*, demurred to so much of the bill as called for the discovery of the above facts, &c.

T. A. Emmet and *Harris*, for the plaintiff.

Burr, contra.

THE CHANCELLOR. It is, no doubt, the general rule of this court, that the creditor filing the bill against the executor, cannot make a debtor of the estate a party, for this would be taking the business out of the hands of the executor, and would lead to confusion in the administration of the estate, as every creditor would then be entitled to such a bill against every debtor. The same cases, however, admit that there are exceptions to the rule, as where the executor is insolvent, or there is collusion between the executor and the debtor, or where there is some other special case not exactly defined. (*Utterson v. Mair*, 2 *Vesey*, jun., 94. *Alsager v. Rowley*, 6 *Ves.* 748. *Burroughs v. Elton*, 11 *Ves.* 29.) As there is no suggestion of insolvency in the administrator, or of collusion, this case does not fall within those exceptions. But the strong objection to the demurrer is, that this is a special case, not within the reason of the general rule. It is more like the case of one partner call-

ing the other to account ; for, taking the charges in the bill to be true, as we must do in judging of the demurrer, the plaintiff was the *cestuy que trust*, for whose use, and with whose money, the intestate carried on trade with the defendant : and, as Lord *Hardwicke* observed, in *Newland v. Champion*, (1 Ves. 105.,) the case of partnership is very different from the other cases, and there were many instances where the surviving partner of a deceased debtor was made a party, so that there might be *an account of the personal estate entire*. And he said, in that case, that though there was no suggestion of collusion between the surviving partner and the representative of the deceased, yet the bill was not demurrable to, and an account was accordingly directed between the creditor of the deceased partner and the survivor. In this case, it appears to me, independent of all authority, that the plaintiff, upon his bill, is most fitly entitled to call from the defendant a full account of the latter copartnership, and that he can obtain such an account from no other source so fully and effectually as from the defendant, *Tardy*.

The demurrer is, accordingly, overruled, with costs.

Decree accordingly.

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MAJESTRE.

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GREEN.

October 7th.**GARSON against GREEN AND OTHERS.**

A vendor has a *lien* on the estate sold, for the purchase money, while the estate is in the hands of the vendee, and when there is no contract by which it may be implied that the *lien* was not intended to be reserved.

Prima facie the purchase money is a *lien*, and it lies on the vendee to show the contrary : and the death of the vendee does not alter or defeat the *lien*. Nor does the taking a promissory note for the purchase money affect the *lien* ; and, if part be paid, the *lien* is good for the residue ; and the vendee is a *trustee* for what is unpaid.

THE bill stated that the plaintiff sold to *James Green*, now deceased, intestate, in his lifetime, the one undivided third part of a house and lot of ground, of which the intestate was seized of two undivided third parts, in fee ; and for which he was to pay the plaintiff 700 dollars, 200 dollars in cash, and the residue in 55 days, for which he was to give his promissory note ; that on the 2d of *December*, 1807, the plaintiff executed and delivered a deed to the intestate, for the plaintiff's undivided third of the premises, and the intestate paid him the 200 dollars, and gave him a promissory note, dated the 12th of *December*, 1807, for 500 dollars, payable in 55 days after date. Before the note became due the intestate died, leaving *Margaret Green*, defendant, his widow, who took out letters of administration on his estate, and the other defendants, his heirs at law.

The administratrix having refused to pay the note, the plaintiff brought an action at law against her, to which she pleaded *plene administravit* ; and the plaintiff being unable to prove assets in her hands, took judgment for assets *in futuro*, to the amount of 535 dollars and 19 cents, and the costs of suit. The plaintiff alleged that the intestate died seized of the house and lot above mentioned, and other real estate in *New-York*, and left considerable personal estate, which came into the hands of the administratrix.

The bill, as to the administratrix, was, under the order of the court, taken *pro confesso*. The other defendants, by their guardian, answered, and admitted the sale by the plaintiff to their father, the intestate, and that he owed to the plaintiff the amount of the note, but whether it was for part of the consideration money for the house and lot they were ignorant.

The material allegations in the bill were proved by the witnesses.

Slosson, for the plaintiff.

Blake, contra.

THE CHANCELLOR. It is very evident from the proof, that the note was given in part payment of the consideration for the sale, by the plaintiff, of his undivided third part of the house and lot mentioned in the pleadings; and there is no evidence that the vendor did not mean to trust to the estate sold, as a pledge for his money. It is a well-settled rule, (*6 Ves. 483. 759, 760. 1 Schoale & Lefroy, 132. 1 Bro. 420. Sugden, ch. 12. p. 352.*) that the vendor has a lien on the estate for the purchase money, while the estate is in the hands of the vendee, and when there is no contract that the lien, by implication, was not intended to be reserved. *Prima facie* the purchase money is a lien on the land, and it lies on the purchaser to show that the vendor agreed to rest on other security. The death of the vendee does not alter the claim; for, as Lord Redesdale observed, in a like case, (*Hughes v. Kearney, 1 Schoale & Lefroy, 132.*) “the heir cannot be permitted to hold what his ancestor unconscientiously obtained; and is not a thing unconscientiously obtained when the consideration is not paid?” Taking a note for the purchase money does not affect the vendor’s lien, and if part be paid, the lien is good as to the residue, and the vendee becomes a trustee as to that which is unpaid. (*Blackburn v. Gregson, 1 Bro. 420.*) The

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failure of the personal estate is sufficiently shown in the first instance; and there is nothing to gainsay it, and I shall, accordingly, decree a sale of the one third of the house and lot, towards satisfaction of the note.

Decree accordingly.

Sept. 23d and
Oct. 11th.

ASTOR against ROMAYNE AND OTHERS.

Sale of mortgaged premises, under a decree, will not be postponed merely on account of the existence of war; war, as a general calamity, not being sufficient to justify the court in interrupting the regular administration of justice, and the collection of debts.

But if it should be made satisfactorily to appear, that there was any immediate or impending calamity over the city, or place, where the mortgaged premises were situated, which would cause a suspension of all civil business, the court would interfere, and postpone the sale.

A sale of mortgaged premises was postponed for six weeks to give the mortgagor an opportunity to comply with the proposal of the mortgagee, such delay being equally beneficial to both parties.

MOTION, on the part of the defendant, to postpone the master's sale of *mortgaged premises* on affidavit of the defendant, *Romayne*, stating that the bill was filed in *March*, 1811, that in the latter part of the year 1812, the defendant agreed to relinquish all opposition to the suit, and to give the plaintiff a decree, by consent, for £38,595 75, provided he would wait until the 1st day of *September*, 1814, for payment; and a decree was entered in pursuance of that agreement. That the agreement was made under the firm persuasion that the war would have speedily ceased, and that if the defendant should not be able to raise the money out of the property *mortgaged*, the property would rise in value. That he has been disappointed, and the plaintiff had advertised the property for sale on the 26th instant; and that the plaintiff and the mas-

ter have refused to postpone the sale. That the deponent verily believed the property *mortgaged for the debt* would be worth, in ordinary times, \$45,000, but in the present critical and alarming state of affairs in New-York, could not be sold for half its value.

It appeared that the *notice* given of the motion was four days short of the time required by the rule of the court.

Van Vechten, for the defendant, cited the case of *Alexander Macomb*, at the suit of *Corp., Ellis, and Shaw*, in which there was a sale of a large real estate, in and near New-York, advertised for the 18th of July, 1810, and the day for the sale had been fixed by consent; but the defendant, on due notice, petitioned the Chancellor for a postponement of the sale, on the ground that most of the moneyed purchasers of land were in the country, and that the season of the year was most unfavourable; and though the motion was opposed by counsel, for the plaintiffs, the Chancellor, by a special order of the 14th of July, 1810, postponed the sale to the 2d *Monday* in November following. He also cited 4 *Bro.* 113—172., and 2 *Powell on Mortgages*, 1071—2.

THE CHANCELLOR. The case of *Cocker v. Beavis*, (1 *Ch. Rep.* 134., and 1 *Ch. Cas.* 61.,) shows that chancery has enlarged the time for the performance of a decree, though that decree was entered by *consent*, on a *bill to redeem a mortgage*, and the time of payment was *fixed by the decree*. In that case the default of the party was not wilful, but arose from necessity, growing out of the civil war. There is some analogy between that case and this; and in another case, of *Ismoord v. Claypool*, (1 *Ch. Rep.* 139.,) the court enlarged the time, after the enrolment of the decree, six months, to pay the mortgage money. I do not know that those cases have been acted upon in modern times, and the application, in this case, is defective, being on short notice:

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1814. the most I am willing to do, is to direct the master to postpone the sale from the 26th instant to the second Monday in October, to give the defendant an opportunity of applying regularly to the court.

Astor v. Romayne. *S. Jones*, jun., for the defendants, on an affidavit read on the former motion, and several other affidavits to the like effect, now moved for a postponement of the sale for six months. He cited 2 *Equ. Cases Abr.* 609. S. C. 15 *Vin. Ab.* 476. (z. 2.) 2 *Powell on Mortgages*, 311. *Barm. Rep.* 221.

Harrison and Robinson, contra.

It appeared that the plaintiff had offered to the defendant to wait two or three years for the principal, if the defendant would pay him arrears of interest. The offer was now repeated by the plaintiff's counsel, who stated that the rule for the decree, which was entered by consent, contained a stipulation by the defendant, that he would not apply to the court for delay.

The existence of the war, as a general calamity, will not justify courts in interfering to interrupt the regular administration of justice, and the postponing a election of debts. The only plausible ground of the motion is the special state of the city of New-York, in which the property is situated, and the sale to be made. If there were

But an insufficient evidence of the existence of any immediate calamity, as injury, present, or impending over the city, such as invasion by invasion or sickness, present the enemy, or extreme sickness, which would suspend all civil or impending business, the court ought to interfere and postpone the sale. where the premises are situated, so as to from the enemy is too slight, from any thing that has been produce a suspension of all shown to the court, to warrant the granting the motion to any civil business, considerable extent. If the sale be postponed a few weeks, the court in to give the defendant an opportunity to comply with the offer postponing the sale.

of the plaintiff, it is as much as I feel authorized to allow. This delay may be equally beneficial to both parties ; the plaintiff is not in distressed circumstances, since he is willing to wait for years, on payment of his interest. It must also be admitted, that the state of the city of New-York, for some weeks past, under apprehension of invasion, and which apprehension has not yet entirely ceased, deserves some consideration, and renders a delay of a few weeks desirable. In that time business may become more quiet and regular, and more and better purchasers will probably appear.

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Sale postponed for eight weeks.

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*Executors of J. J. ARDEN against the Executors of
J. ARDEN.*

*Aug. 29th
and October
13th.*

In a suit between the representatives of a father, and the representatives of his son, where all the matters in controversy were referred to a master, the court refused to allow the exceptions made to the report ; the transactions being very stale and ancient, and most of them family dealings and concerns, and the parties, and their witnesses, having been fully examined before the master.

Though the statute of limitations is no bar to a *legacy*, yet the court, in regard to very stale demands, will adopt the provisions of the statute, in the exercise of their discretion. Though a lapse of 30 years affords a presumption that a legacy has been paid, yet that presumption may be repelled by circumstances.

Where a testator directed his executors to sell his real estate, to pay debts and legacies, in case of a deficiency of the personal estate ; and a bill filed by the executors of a legatee and creditor, prayed a sale of the real estate, the executors of the testator having admitted that the personal estate was insufficient, the court directed a master first to ascertain and report whether the executors had duly administered all the *assets*, before recourse could be had to the land, or determining whether the *devisees* in remainder were to be brought in.

JACOB ARDEN, the defendants' testator, being seized and possessed of considerable real and personal estate, on the

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15th of *April*, 1778, made his last will, by which he gave to his son, the plaintiffs' testator, a legacy of 200*l.*, payable three months after the testator's death; and he also gave a legacy of 100*l.* to his daughter *E.*, and, for want of cash to discharge the said legacies, he directed and empowered his executors to sell any part of his estate they might think best, for that purpose.

The estate of the defendants' testator was indebted to the plaintiffs' testator, for 52 dollars and 36 cents, on account, and for three several bonds, executed by *J. Arden*, in 1766, 1767, and 1771, to several persons, and by them assigned to *Jacob J. Arden*, in 1787, and 1793, the amount of which, with interest, to the 19th of *October*, 1804, was 1,152 dollars and 35 cents. It was admitted, by the plaintiffs, that 100*l.*, part of the legacy, had been paid; but they claimed, as due to them from the defendants' testator, the sum of 2,261 dollars and 6 cents.

The plaintiffs' testator made his will in *June*, and died in *July*, 1801.

The plaintiffs, in their bill, charged that the defendants refused to give an account of the real and personal estate of their testator, pretending that there was not enough to satisfy the debts and legacies, &c., and that they had no power to sell the real estate, &c. The bill prayed relief, &c., and for an account, and that so much of the real estate of the defendants' testator as might be necessary to pay and satisfy the plaintiffs' claim, might be sold, &c.

The answer of the defendants admitted all the material facts stated in the bill, except the amount of the debt claimed. On the 17th of *May*, 1813, there was an order of reference to a master to take an account, and to ascertain and report upon all the matters contained in the pleadings, and by consent, to examine the parties on oath, and all witnesses produced on either side.

On the 14th of *January*, 1814, the master made a report that there was due to the plaintiffs, upon the *legacy, bonds,* and several *accounts* mentioned in the pleadings, the sum of

1,435 dollars and 89 cents, according to the schedules annexed to his report.

To this report the defendants made the following exceptions :

1. That no credit was given to the defendants for 100*l.* stated to have been received, on the 15th of *July*, 1796, by the plaintiffs' testator, from *James Delancy*, with interest.
2. That no credit was given for 15*l.*, due to the defendants' testator, for house and rent, for *S.*, at *H.*, in 1782.
3. That no credit was given for 336*l.*, for board of plaintiffs' testator, his wife and children, from 1775 to 1782 ;
4. Nor for 36*l.*, paid by the defendants' testator for a substitute in the army for the plaintiffs' testator, in 1776 ;
5. Nor for 1925 dollars, the amount of certificates of part of the estate of the defendants' testator, the inventory of which was taken by one of the plaintiffs ;
6. Nor for 6*l.*, for barn rent, &c., in 1782 ;
7. Nor for 3*l. 2s.* for articles furnished plaintiffs' testator in 1784.
8. Because *Th. Arden, jun.*, was examined as a witness before the master.
9. Because the legacy, after a lapse of 30 years, ought to have been presumed to have been paid.

The plaintiffs expected to the report, because the defendants' testator had been credited for a butcher's stall 100*l.* instead of 17*l.*

These exceptions were reserved until the final hearing of the cause.

R. Riker, for the plaintiffs.

Burr, contra.

THE CHANCELLOR. The validity of the charges specified in the exceptions, depended upon the proofs before the master, and I see no sufficient reason to interfere with his report in respect to either of those charges which have not

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been allowed. Some of them were not supported by proof, and others do not appear ever to have been made and intended, by the defendants' testator, as debts to be refunded by the son.

The transactions referred to are stale and ancient, and the more loose and difficult to unravel, because they were family dealings, and concerns between the father and son. It would be hazardous to sift too nicely such charges. The master was directed to take an account, and the parties have had a full and fair hearing before him, as well with their proofs as with their allegations. The demands on the part of the plaintiffs were chiefly founded on unquestionable vouchers, such as the will and the bonds; and the only objection to them arose from the presumption of payment, founded on the lapse of time. But these charges, brought forward on the part of the defendants, were destitute of any real accuracy and authenticity, and seem to have been set up more for the purpose of embarrassing the counter claims, than from any real sense of their solidity.

The objection to the demands of the plaintiffs, on the ground of time, is, *prima facie*, of great weight. After a lapse of 40 years, and when the representatives of the real and personal estate were all dead, the presumption of payment of a legacy was suffered to prevail, though the parties were admitted to make proof to repel the presumption, but it was not sufficient. (*Jones v. Turberville*, 2 *Vesey*, jun., 11.) And, in a subsequent case, the Master of the Rolls thought that 35 years would be sufficient to bar a legacy, on the presumption of satisfaction. (2 *Vesey*, jun. 272. *Pickering v. Stamford*.) There is no legal bar by force of the statute of limitations to a legacy. It cannot be pleaded, but still the court, justly averse to giving countenance to very stale demands, adopts the provisions of the statute as a guide in the exercise of its discretion. (*Higgins v. Crawford*, 2 *Vesey*, jun. 571. *Prince v. Heylin*, 1 *Aik.* 493. *Stackhouse v. Barnston*, 10 *Ves.* 466—7.) In the present case, however, the presumption of payment, both as

to the legacy and the bonds, is sufficiently repelled. The executors, who were to pay the legacy, are alive, and parties to the suit, and one of them expressly admits, that only one moiety of the legacy has been paid ; and he also admits the payment of interest, from time to time, on the bonds, and that they are still due. In addition to this answer of one of the defendants, he has been examined before the master, under the order of reference, and his credit submitted to inquiry. In this case, and upon these proofs, we must take the admission of the only competent executor, and it will not do to set aside these admissions on mere surmise of some collusion. The question, on the fidelity of the defendants, as trustees, is not now in issue, and it is averred, and so I should infer, (as the objection has not been raised until now,) that the examination of *Th. Arden* was by consent, and at the instance, and for the benefit, of the other defendant ; and if the legacy and bonds are due in any part, interest thereon follows as of course.

The exceptions were, accordingly, disallowed, and the report confirmed.

As the cause was set down for final hearing, as well as upon the exceptions, another point submitted was, whether a decree for the sale of the real estate ought to be made. The prayer in the bill was for a sale of so much of the real estate as should be necessary to pay the debt, and the answer of the defendants admitted the insufficiency of the personal, and the sufficiency of the real, estate. The debts were not charged upon the real estate, but the executors were directed, in case the personal estate failed, to sell so much of the real estate as should be requisite to pay the legacies. An objection was made, that the devisees were not parties.

The cause coming on again, upon this last point, it was referred back to the master, to ascertain and report whether the executors had duly administered all the assets. This was necessary to be ascertained, before recourse could be had to the land, or before it was requisite to determine

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Order accordingly. (a)

(a) Note. The question of parties was not, afterwards, agitated, as certain lands were directed to be sold, which the executors had purchased after the testator's death, and with his funds.

October 19th.

STEVENS against BEEKMAN AND OTHERS.

An injunction is not allowed, in order to prevent the repetition of a *trespass*, in entering and cutting down timber, on land of which the plaintiff is in possession as owner, and has adequate remedy at law for the trespass. Though, it seems, an injunction may be allowed in a case of trespass, under very special circumstances.

MOTION for an injunction on a bill, stating that the plaintiff, on the 20th of *March*, 1806, purchased by deed, in fee, for a valuable consideration, of *Jacob Glen*, certain lands therein described, in the county of *Saratoga*, and adjoining *Glen's Falls*. That before the purchase, the plaintiff, for 20 years and upwards, had been in the quiet possession of the greater part of the premises, as tenant to *Glen*, and of the residue for about 3 or 4 years. That *Glen* had good right and title to sell. That the plaintiff had continued, and still was in possession as owner. That about 3 or 4 years ago, the defendant (*Beekman*) brought an action of ejectment against the plaintiff, for the south or west part of the premises, and which suit had never been brought to trial. That *Beekman* had no title. That the other two defendants, *I. and G. Lummendall*, deriving, or pretending to derive, a title under *Beekman*, had entered on the premises, and cut down timber, and taken it away, without permission:

and that the part of the premises on which such waste was committed, was principally, if not exclusively, valuable on account of the timber. That the two other defendants were still continuing to commit waste on the premises, and the plaintiff was apprehensive that the defendants would continue to do so, unless restrained by this court. The plaintiff, therefore, prayed for an injunction against a repetition of the trespass, and that the defendants may account for the timber already cut.

The bill was sworn to, and with an accompanying affidavit, that the two last defendants were poor.

J. V. N. Yates and Burr, for the plaintiff.

THE CHANCELLOR. This is a case of an ordinary trespass upon land, and cutting down the timber. The plaintiff is in possession, and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and if the precedent were once set, it would lead to a revolution in practice, for trespasses of this kind are daily and hourly occurring.

I doubt, exceedingly, whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. Such cases are generally of local cognizance; and drawing them into this court would be very expensive, and otherwise inconvenient. Lord *Eldon* said, that there was no instance of an injunction in trespass, until a case before Lord *Thurlow*, relative to a mine, and which was a case approaching very nearly to waste, and where there was no dispute about the right. Lord *Thurlow* had great difficulty as to injunctions for trespass; and though Lord *Eldon* thought it surprising that the jurisdiction by injunction was taken so freely in waste, and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases of a special nature, and where irreparable damage might be the consequence, if the act con-

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tinued. It has also been allowed in cases where the trespass had grown into a nuisance, or where the principle of multiplicity of suits among numerous claimants was applicable. (*Mitchell v. Dors*, 6 *Ves.* 147. *Hansen v. Gardner*, 7 *Ves.* 305. *Smith v. Collyer*, 8 *Ves.* 89.) There is the less necessity for the interference of this court, since the statute (*N. R. L.* vol. 1. 525.) makes the cutting down timber a misdemeanor punishable by fine and imprisonment, and also gives the party injured treble damages. There is nothing in this case so special and peculiar as to call for this particular relief, and especially, when I am not justified by any established practice and precedent.

Motion denied.

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October 28th.

SMITH AND MEAD against LOWRY.

An injunction will not be granted to stay proceedings at law, on a judgment, on the ground that the defendant at law was prevented, by public business, from making due preparations for, and attending at the trial, and that the plaintiff had, on the evidence of one witness, whom he had suborned to swear falsely, recovered a verdict for a much larger sum in damages than he was justly entitled to; and that the supreme court had refused to grant a new trial in the cause.

THE bill, which was for an injunction, stated, that in *May*, 1811, the plaintiffs contracted to deliver to the defendant, in satisfaction of a debt of 675 dollars, owing to him, 140 barrels of salt, at *Portland*, on the southerly side of lake *Erie*, on the 1st of *September*, 1812. That war intervening with *Great-Britain*, and obstructing the communication between the salt works at *Onondaga* and that place, the parties agreed that the contract should be satisfied by the payment of 100 dollars in cash, and a quantity of hats,

and the residue in salt, to be delivered at *Lewistown*, in *Niagara* county, at the market price. That the plaintiffs were ready to perform the contract, but that the defendant was not ready to receive. That the defendant, afterwards, sued *Smith*, in the supreme court, on the contract first made, and the cause was brought to trial at the *Onondaga* circuit, in *June*, 1814. That *Smith*, for some weeks previous to the time of trial, being engaged in public business, in transporting public stores from *Oswego Falls* to *Sackett's Harbour*, could not be allowed to quit the public service, to prepare for the trial, so that due preparation, on his part, was not made.

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That, at the trial, the present defendant proved, by one witness, that on the 1st of *September*, 1812, he sold 18 bushels of salt, at *Portland*, for 12 dollars a barrel; and, on this evidence, a verdict was found for the plaintiff in that suit, estimating the salt at that rate, for above 2,000 dollars. That *Smith*, at the last *August* term of the supreme court, applied for a new trial, on affidavits of seven witnesses residing at *Portland*, that the price of salt, in that place, in *September*, 1812, was 8 dollars a barrel; that the village was small, and half the quantity contained in the contract would have overstocked the market; but the supreme court refused to grant a new trial, merely to enable the party to diminish the damages. That, since the trial, the plaintiffs have discovered that the witness produced by the present defendant, at the trial, was procured by subornation and corruption: that the defendant procured the witness, as his agent, to make a pretended sale of 18 bushels of salt, to a purchaser, substituted by the defendant for that purpose, at the rate of 12 dollars a barrel, which sale was not *bona fide*, but collusive; that the same 18 bushels were purchased at *Portland*, about the 1st of *September*, 1812, at 8 dollars per barrel.

That a *fi. fa.* had been issued on the judgment of the supreme court; and the plaintiffs prayed an injunction, &c.

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Gold, for the plaintiffs.

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THE CHANCELLOR. This is not a case in which the court can interfere with the verdict and judgment at law. The plaintiff, *Smith*, was in public employment for some weeks previous to the trial, but he was, at the time, in or near the county of *Onondaga*, and he had an attorney and counsel employed to attend to his cause; and it does not appear that any application was made, on his part, to the circuit court, to postpone the trial. He must have known, or he was bound to know, that he was sued upon the original written contract mentioned in his bill, and that the price of salt, at the place of delivery, on the 1st of September, 1812, would be a matter of inquiry at the trial. He may, therefore, be considered, from his own statement, as having voluntarily gone to trial on the question of damages, as to the value of the salt, and the application for a new trial was not on the ground of irregularity or surprise, but on the discovery of testimony, to prove the damages excessive. The only new ground of equity set up is, that, since the application for the new trial, he has discovered that the testimony of the witness, who proved upon the trial the price of salt at *Portland*, was procured by subornation and perjury, and that his testimony was founded upon a fictitious sale, contrived for the occasion. But the general rule at law is, that a new trial is not to be granted to give the party an opportunity to impeach the credit and integrity of a witness. (*Duryee v. Dennison*, 5 Johns. Rep. 248.) This case resolves itself into a mere question of excess of damages, arising from the want, as the bill expresses it, "of due preparation" when the plaintiff went to trial. The fraud alleged in procuring the testimony of the witness could have been sufficiently repelled and defeated by the testimony of the witnesses since procured, as to the true state of the market, and the true price of salt at *Portland*, at the time fixed by the contract for the delivery. The plaintiff, *Smith*, had ex-

cessive damages given against him, at the rate of 12, instead of 8 dollars a barrel for salt, merely because he went to trial unprepared. The cases of relief in equity, against judgments at law, founded in fraud, are, when the fraud goes to the whole judgment, and not to the mere excess of damages in a case properly sounding in damages ; and when the fraud could not have been met and defeated at the trial. It would be setting a precedent most inconvenient to the public, for this court to interfere in a case like this, of the alleged perjury of a witness, on a question as to the amount of damages, and to provide for a new trial when an application for a new trial has already been denied at law, and when courts of law exercise a most liberal and equitable discretion on the subject of new trials, and when the injury complained of is, in a great degree, to be imputed to the party's own want of preparation.

Applications to this court for a new trial, after a verdict at law, are very rare in modern times, since courts of law exercise the same jurisdiction, and to the same liberal extent. In the late case of *Bateman v. Willoe*, (1 Schoale & Lefroy, 201.,) Lord Redesdale observed, that “a bill for a new trial was watched by equity with extreme jealousy, and it must see that injustice has been done, *not merely through the inattention of the parties* ; and he held it to be unconscientious and vexatious, to bring into a court of equity a discussion which might have been had at law.” Even in the old cases, and before new trials were much known and used at law, the court of chancery proceeded with great caution in awarding a new trial at law. In *Curtis v. Smallridge*, (1 Ch. Cas. 43. 2 Freeman, 178.) the bill was for relief against a recovery in *trotter* ; and though it appeared that the recovery was unjust, and had so been admitted by the plaintiff in law, yet, as it did not appear that the defendant at law was prevented by accident from having his witnesses at the trial, the Master of the Rolls would not grant a new trial for the neglect of the party, and so dismiss-

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ed¹ the bill. In *Tovey v. Young*, (*Prec. in Ch.* 193.,) the bill for a new trial at law was dismissed, though the plaintiff had discovered, since the trial, that the principal witness against him was interested ; and the Lord Keeper observed, that "new matter may, in some cases, be ground for relief, but it must not be what was tried before ; nor, when it consists in swearing only, will I ever grant a new trial, unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, was convicted of perjury." And Lord *Hardwicke*, in *Richards v. Symes*, (2 *Aik.* 319.,) refused a new trial on the suggestion that the party was not apprized of a particular evidence, and, therefore, not prepared to meet it. The chancery cases have generally agreed in granting a new trial at law, on the discovery since the trial, of a receipt or acquittance in full of the demand. (The Master of the Rolls, in *The Countess of Gainsborough v. Gifford*, 2 *P. Wms.* 424. *Hennell v. Kelland*, 1 *Eq. Cas. Abr.* 377. and 2 *Vern.* 437., cited *ib.* *Williams v. Lee*; 3 *Aik.* 223.) But since the decision in the K. B., in *Marriot v. Hampton*, (7 *Term Rep.* 269.,) this doctrine seems to be overruled, on the broad ground that there must be an end of litigation ; and it may be questioned whether equity would now interfere, even in this case, after the refusal by a court of law. I find that so early as the case of *Sewell v. Freeston*, (1 *Ch. Cas.* 65.,) the court of chancery refused assistance where the defendant at law had written a letter which the plaintiff could not prove at the trial, and which would have discharged him.

Upon the whole, it appears to me that, under the circumstances of this case, the plaintiff is not entitled to the interference of this court to stay execution on the judgment, and that the motion for an injunction must be denied.

Motion denied.

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BRADWELL,

V.

WEEKS.

W., J., & B. BRADWELL, *infants*, (*by their guardian and next friend*,) against WEEKS.

Nov. 7th.

Infants cannot, by their *solicitor or counsel*, petition the court to be relieved from the necessity of depositing the sum required by the rules of court, on entering their *appeal* from a decree ; but must, as in all other cases, appear by their *guardian or next friend*.

The 37th Rule of this court, made June 7th, 1806, requiring the party appealing from a decree or order of this court, to deposit 100 dollars with the register or assistant register, to answer for costs, &c., is an equitable and salutary rule, intended to prevent delay and abuse.

PETITION of the three infant plaintiffs, with their names subscribed by *A. Burr*, their solicitor and counsel, stating, that on the 31st of *May*, 1814, they exhibited their bill, claiming the whole personal estate of *John Bradwell*, their deceased uncle ; that, " by the decree of this court, one third of the personal estate was directed to be paid to certain persons who were of kin to the deceased, but subjects of *Great Britain*, and resident in *England*;" that they deem the decree to be erroneous, and wish to enter their appeal ; but that, by the rules of this court, they are required first to deposit with the register the sum of 100 dollars ; that the plaintiffs cannot command that sum ; and, as the appeal will not occasion delay, they prayed leave to appeal without making such deposit. (Vide S. C., and the decree of the court, *ante*, p. 206.)

Burr, for the plaintiffs.

Riggs, contra.

THE CHANCELLOR. The objections to the motion appear to be well taken.

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(1.) The plaintiffs, being infants, cannot act by solicitor in this instance more than in the other proceedings in the suit. The suit was commenced and conducted for them by their guardian and next friend, and no reason appears why the guardian is dropped in this application. It is against the course and order of the court, and not conducive to the security of the rights of the parties. The infants should act under the advice and discretion of their guardian or next friend, and the opposite party has, in such case, a responsible person for costs.

The decree is inaccurately stated in the petition, but as a true copy was annexed, the mistake was capable of correction.

(2.) As a new petition, in the name of the guardian, might hereafter be preferred, it will be convenient to the parties that I should now consider the fitness of the application upon its merits.

The 37th rule of the 7th of June, 1806, requires that the party appealing from a decree or order of this court, should deposit 100 dollars with the register or assistant register, to answer the costs, if he shall not prosecute the appeal with effect; and, in default, "proceedings shall thereupon be had, as if such appeal had not been made."

If this be a rule just and reasonable in itself, and one which the court had authority to make, I see no sufficient reason for dispensing with it in this particular case. The practice of the court ought to be settled and uniform.

The object of the rule was to prevent the abuse of suing out appeals for the mere purpose of delay, without any *bona fide* intent of prosecuting them to effect, by subjecting the party, at all events, to the payment of the costs, which his appeal necessarily produces. The practice with us is to lodge the appeal in the register's office, and the court above is not considered as possessed of the jurisdiction of the cause, until the petition of appeal has been presented to them, and which cannot be until they are in session. Without this

deposit, a cause might be delayed in this court during the whole vacation of the court of errors, (which is generally from *April* to *February*,) and the appeal be then abandoned without any means of affording indemnity for the costs in the mean time accrued. The court above cannot award costs unless they are possessed of the cause, and that cannot be until the petition of appeal is presented to that court, and filed. If an appeal, then, be lodged in the register's office, according to our practice, and, perhaps, soon after the adjournment of the court for the correction of errors, it must rest in the discretion of this court to determine, in the first instance, whether that appeal shall be a stay of proceedings. The most intolerable abuse would otherwise arise under the practice of appeals ; for, as Lord *Eldon* observed, if a petition, even to stay proceedings in a cause, were refused, the party would have nothing to do but to appeal from that order, and thus carry his point. There must, then, as I had occasion lately to consider in the case of *Green v. Winter*,^{* * *Ani*, p. 77.} be a power and a discretion in the Chancellor, as there is, on error, in a court of law, (*Entwistle v. Shepherd*, 2 *Term Rep.* 78. *Kempland v. Macauley*, 4 *Term Rep.* 436.,) to determine, in the first instance, upon the operation of the appeal, and to what extent, and upon what points, it shall stay proceedings. The object of the rule was to prevent the abuse of lodging an appeal in the register's office, and delaying the cause, and putting the officer to the expense of making out the requisite transcripts, and the opposite party to the expense of preparing to meet the appeal, and then abandoning the appeal before it had ever been duly presented to the court above, by which means that court could not award costs. After the court above has become possessed of the cause, so as to do justice between the parties, by preventing delay and awarding costs, the necessity of the deposit ceases.

The object of the rule is not to restrain appeals, (for this court does not pretend to any such power,) but merely to

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1814. prevent a stay of proceedings without the deposit; and, in
BRADWELL this view, it is a just and salutary rule, and within the ordinary powers of the court.
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I have conversed with my predecessor, who made the rule of 1806, and he gives the view of it which I have stated; he says he found a similar rule existing when he came into this court, which was made by Chancellor Livingston in the early history of the court. After such a sanction and usage, it would not be becoming in me to reject the rule at once, as unfit and illegal. I ought to be taught its inconvenience by experience, or become persuaded, upon the fullest consideration, of its illegality.

The practice of requiring deposits of money to meet costs, is common in the *English* chancery. A rehearing will not be granted without a deposit of 20*l.*, (*Cur. Can.* 343. *Wyatt's P. R.* 369.) nor a bill of review without a deposit of 50*l.*; (*Gilbert's Forum Romanum*, 186. ;) and yet a rehearing and a review are remedies to which the party aggrieved has as perfect a right as he has to an appeal. The statute organizing the court of errors, and which grants the appeal, is not to be construed so strictly as to preclude all checks upon the abuse of appeals; for, to prevent the abuse is in furtherance of the due exercise of the right. The statute is as much binding upon the court above, as upon this court, and if it renders the rule of this court illegal, it would equally prohibit any similar rule in the court above; and yet I presume it will hardly be contended that the court above has not competent power to regulate the practice on appeals, and to require of the appellant even security for costs on filing his appeal. In the *English* house of lords, there is a standing rule of the 26th of January, 1710, that the appellant shall, in 8 days after the appeal is received, give security, by recognizance in 200*l.*, to pay costs, if the decree be affirmed; and I have no doubt that the court for the correction of errors, in this state, is competent to make a similar rule. It has always been supposed that it had authori-

ty, as a necessary incident to its jurisdiction, to render its practice conformable to that of the house of lords in *England*, when sitting as a court of appeal; and such was the declared sense of the court, by its 6th rule, of *February, 1786.*

Upon the whole, it appears to me that the rule in question is fit and proper to prevent the abuse of appeals, by suing them out merely to gain time, and avoid costs; and that it ought to continue until this court is better advised of its unfitness, or until the court above shall have made some other or further rule on the subject.

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Motion denied.

— * —
BUNN AND OTHERS *against* WINTHROP AND OTHERS. 1815.
January 16th.

A voluntary conveyance or settlement, though retained by the grantor, in his possession, until his death, is good.

As between the parties, a voluntary actual transfer, by deed, of a chattel interest, is valid, without any consideration appearing.

In regard to chattel interests, an agreement under *seal* imports a consideration at law. And a voluntary bond, or deed of a chattel interest, will be supported in equity, without consideration.

A *cestuy que trust*, though a mere volunteer, and the limitation without consideration, is entitled to the aid of this court; but the rule is otherwise where the party seeks to raise an interest by way of trust, on a covenant or executory agreement.

Provision for the mother of a bastard, and for her infant, is a sufficient consideration to support a bond, or a deed of a personal chattels, made by the father of the child for that purpose.

Plate used in the family passes under a devise or conveyance of "household goods and furniture."

THE bill in this case stated, that *Thomas Marston*, deceased, being seised of a large real and personal estate, made his will, on the 27th of *July, 1808*, by which he devised parts of his real estate to his grandchildren, and made

1815. some of the defendants his executors. The testator died
Bunn v. Winthrop.

Hannah Curry, one of the plaintiffs, separated from her husband, *John Curry*, and by articles, dated *July 3, 1802*, mutually entered into between them, by means of *William Bunn*, plaintiff, as *trustee*, with sureties, she was allowed to live separate from her husband, and enjoy all her estate and property, to her sole and exclusive use.

Mary Bunn Marston, an infant, also one of the plaintiffs, was the natural child of the testator and *Hannah Curry*. For about 18 years previous to the death of the testator, *Hannah Curry* resided in his house, and had the care and management of his family, as his housekeeper, the testator being upwards of 70 years of age at the time of his death. The testator repeatedly declared his intention to make provision for *Mrs. Curry*, and his infant daughter by her; and from motives of gratitude towards her, for her long and faithful services, and a sense of moral obligation to provide for her daughter, the testator did, on the 26th of *February*, 1811, make and execute a deed, by which he granted and conveyed to the defendant, *Winthrop*, a house and lot of ground in the city of *New-York*, free from ground rent, during the term for which the testator held the premises, to receive the rents and profits, and apply the same to the support and maintenance of *Mrs. Curry* during her natural life; and, after her death, he granted and conveyed the premises to his natural daughter, *Mary Bunn Marston*, her heirs and assigns; and by the same instrument, the testator further gave to *Mrs. Curry*, "so much of his furniture and household goods, then in his house, as she could think sufficient towards furnishing a house in a genteel style;" and all the residue of his furniture and household goods, he gave to the said *Mary Bunn Marston*.

This deed, duly signed, sealed, and delivered, by the testator, in presence of two witnesses, was, by him, enclosed, under cover, with his last will, and was found so enclosed,

after his death, by his executor, *Winthrop*, who delivered the same to Mrs. *Curry*. *Winthrop*, the defendant, is the only acting executor. The furniture and household goods continued in the house of the testator until his death; and he left a large real and personal estate, over and above all his debts. That the defendants object to the deed in favour of Mrs. *Curry*, alleging it to be of no validity as a deed, for want of delivery to the grantee; and because the testator retained the possession of the goods; and that it is also invalid as a testamentary disposition, there being no words to show a testamentary intent. The bill charged that the *plate*, in the house of the testator, was used as part of the furniture, and prayed that the defendant, *Winthrop*, might elect to accept or decline the trust declared in the deed; and that if he should decline, that he might be directed to bring the lease into court; and that the court would appoint a trustee; and that the defendant, *Winthrop*, be directed to furnish an inventory of the plate, furniture, &c.; and that the court would decree the instrument above mentioned valid as a deed or testamentary disposition, &c. That the plaintiff, Mrs. *Curry*, be at liberty to elect and take her portion of the furniture, &c.; and that the residue be delivered to the guardian of the infant, *Mary Bunn Marston*, or otherwise be disposed of for her benefit, &c.

The defendants, in their answers, admitted the facts stated in the bill, and the execution of the deed; but they denied its operation or validity, or that it was delivered by the testator, unless its remaining in the manner stated in the bill amounted, in law, to a delivery; and the defendant, *Winthrop*, expressly refused to accept the trust, or act as trustee; and he annexed to his answer a copy of the inventory of the household furniture of the testator, including his plate; and it was admitted that the testator left a clear estate of the value of 160,000 dollars, over and above all debts and encumbrances.

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1815. *Slosson*, for the plaintiffs, contended, 1. That the deed was a valid settlement, and a revocation, *pro tanto*, of the will; that such a voluntary settlement is good; that the possession of the deed by the grantor, until his death, did not invalidate or defeat it. (*Villers v. Braumont*, 1 *Vernon*, 100. *Bale v. Newton*, id. 464. *Boughton v. Boughton*, 1 *Atk.* 625. *Barlow v. Heneage*, *Prec. Ch.* 211. *Clavering v. Clavering*, 2 *Vernon*, 473. S. C. *Prec. Ch.* 235. 1 *Bro. P. C.* 122.)

2. That if the deed was not valid as a voluntary settlement, it was good, at least, as a testamentary disposition, in the nature of a codicil to the last will and testament of the grantor. (*Ousely v. Carroll*, and *Spargold v. Spargold*, cited and commented on by Lord Hardwicke, in *Ward v. Turners*, 2 *Ves.* 440. *Rigden v. Vallier*, 2 *Ves.* 252—258. *Peacock v. Monk*, 1 *Ves.* 127. 1 *Swinburn on Wills*, *Powell's ed. note*, p. 74. part 1. sec. 10.)

3. That the *plate* passed under the general words "household goods and furniture." (*Roper on Legacies*, ch. 16.)

Harison, for the defendants, did not deny the general doctrine as to voluntary settlements, but contended that, in all the cases cited, the voluntary deed was good on the face of it; and that no instance could be cited where a mere voluntary conveyance, not valid at law, had been made valid in equity. (1 *Fonbl. Equity*, 339., et seq.)

In this case, there was no legal consideration for the deed, to make it avail to the *cestuy que trust*. The claims of Mrs. *Curry* were not of that ineritorious nature to give legal efficacy to the deed; and her daughter could not, in law, be so considered the daughter of the testator, as to create the consideration of natural love and affection to support a covenant against him or his representatives. (*Prec. in Ch.* 475. 2 *Ves.* 182.)

As it respected the leasehold estate which this instrument was to convey, it was not a bargain and sale, for want

of a valuable consideration ; it was not a covenant, in the nature of a covenant to stand seised, because there was no legal relationship between the grantor and *cestui que trust* ; it was no demise, for there was no reversion or rent reserved ; it was not an assignment of the term, for the assignee must hold subject to the rent. As to the donation of the household furniture, it derived no additional validity from the deed ; it would be equally good if it had been by *parol*. In either case, a delivery is necessary to consummate a gift. The testator might have revoked it when he pleased, and his representatives cannot be bound where the testator was at liberty. As to any possession by Mrs. Curry, it could be only that of a *servant*, which is a possession for the master. (2 *Vesey*, 438.)

It is not denied that a will, or codicil, may be in the form of a deed ; but, then, it must appear, from the face of the instrument itself, that it was intended to operate after the death of the party ; or, in other words, that it was testamentary. Such was the case of *Peacock v. Monk* ; but the plaintiff did not claim under a will, and unless the conveyance was established as a valid deed, he could not recover. The face of the paper itself does not contain any feature of a testamentary disposition. But whatever may be its complexion, this court cannot establish it ; nor can the plaintiffs found any claim on it, as a testamentary disposition, until it has been proved in the court of the surrogate. To that court, with the right of appeal to the judge of probate, and to the court of errors, is committed, exclusively, the power of determining every thing appertaining to the proof of a will, and every part of it relating to personal property. Even in cases of fraud, so peculiarly within the jurisdiction of this court, if relating to obtaining of wills of personal estate, resort must be had to that tribunal which, in testamentary causes, exercises the power and jurisdiction of the spiritual courts. (2 *Vernon*, 8. 76. 1 *Fonbl. Equ.* 12. 2 *Fonbl. Equ.* 379, 380.) The plaintiffs have, therefore,

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mistaken their remedy ; and should this court even think that the paper ought to be regarded as a testamentary disposition, it ought to dismiss the bill, without prejudice.

Slosson, in reply, said, there was a well settled distinction between deeds for the conveyance of land, and those for the transfer of chattel interests. The former, operating only by creating a *use*, and the transmission of the possession to the *use*, required a consideration to create the *use* ; and blood or marriage is necessary consideration in a covenant to stand seised, for chancery will not aid a mere volunteer, by decreeing a specific performance of a covenant. But if the estate passed by the conveyance at law, equity will support it *against the donor*, as much as if the most solid equivalent had been paid. (*Villers v. Beaumont*, 1 *Vernon*, 100.)

Now, a mere voluntary conveyance of a chattel interest in land, or of personal property, *as between the parties*, there being no fraud or imposition, is valid. A consideration in such a case is not requisite to be shown, where the contract is under *seal*, and the estate executed. This is different from a mere promise or gift, by *parol*, without consideration, and unaccompanied with delivery, and which is properly denominated a *nudum pactum*. But the mere defect of consideration is not the true objection to its validity ; but because the law requires a consideration as evidence of the deliberate assent of the promisor : and this assent may be evidenced by the solemnities with which the contract is made. The solemnity of sealing imports a consideration, or, more properly, it precludes the obligor, except in cases of illegality or fraud, from averring the want of a consideration. So, covenant at law lies on a sealed instrument, and this court will decree the payment of a voluntary bond. (1 *Fonbl.* c. 5. s. 1. note (a.) *Hard.* 200. 1 *Eq. Cas. Ab.* 84. 3 *Johns. Rep.* 491. 3 *P. Wms.* 222.) Where a delivery is not essential to transfer the right of property, the solemn execu-

tion of the deed is sufficient. (1 *Fonbl. Eq.* 338. *Plowd.* 308.) It is to be observed, that the plaintiffs do not seek to establish a defective conveyance, but to prevent a failure of the trust for want of a trustee. (2 *P. Wms.* 222.)

But we contend that, in regard to Mrs. Curry, her long services, as well as the reparation and atonement due to her from the intestate, formed a valuable and meritorious consideration for the conveyance; and this is strengthened, also, by the consideration that it was intended as a provision for the child. Numerous cases might be cited, in which past seduction was held a valid consideration to support a provision for the mother and child. (2 *P. Wms.* 434. *Cas. temp. Tabl.* 153. *Ambler,* 520.)

Though the blood of an illegitimate child is not sufficient in law to *raise a use*, yet a use may be *declared* in favour of a bastard, *in esse*. (*Co. Litt.* 123. *a. n.* 8.)

Again, here is a conveyance coupled with a *trust*, which, in itself, is a consideration, as it requires an act to be done by the trustee.

The grant in this case is not a demise of a term by the owner of the fee, but a transfer by the lessee. We insist, for this reason, that this is a valid conveyance at law, which this court will not suffer to be defeated by the acts or negligence of the trustee.

THE CHANCELLOR. The object of the bill is to seek performance of the trust created by the deed of the 26th of February, 1811, by having a competent trustee provided who will execute it, and by carrying the provisions, in favour of the plaintiffs, into effect. This has led the counsel into a discussion touching the validity of that deed, and how far a court of equity ought to interfere to aid it.

After a consideration of the case, I am induced to conclude, that there is no well-founded objection to a decree in support of the subject matter of the bill.

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The instrument is good, as a voluntary settlement, though retained by the grantor in his possession until his death. There was no act of his, either at the time, or subsequent to the execution of the deed, which denoted an intention contrary to that appearing upon the face of the deed. The cases of *Clavering v. Clavering*, (2 *Vern.* 473, 1 *Bro. P. C.* 122.,) of *Boughton v. Boughton*, (1 *Aik.* 625.,) and of *Johnson v. Smith*, (1 *Ves.* 314.,) I had occasion lately to • *Annt.* p. 251. consider, in the cause of *Souperbye and wife v. Arden*,* and they will be found to be authorities in favour of the validity and operation of deeds of settlement, though retained by the grantor, under circumstances much less favourable to their effect than the one now under consideration.

Nor do I think that the want of some good or valuable consideration appearing on the face of the deed ought to preclude this court from lending its assistance. There is no rule of the court against giving effect, as between the parties, to a voluntary actual transfer by deed, of a personal or chattel interest, without any consideration appearing. The rule, I apprehend, is directly otherwise, as to personal property, whatever it may be as to real estate. It was said by the Chancellor, in *Bold v. Corbett*, (*Prec. in Ch.* 84.,) to be discretionary in a court of equity, whether it would aid a voluntary conveyance where there was no remedy at law; and by looking into the earlier cases it would seem that there was much floating and unsettled opinion on the question how far equity would help a defect in a voluntary conveyance of real property, or decree specific performance in the case of a voluntary covenant. (1 *Ch. Rep.* 84. *Wiseman v. Roper*, 2 *P. Wms.* 467, 8. *Randal v. Randal*, 2 *Vent.* 365. n. 1 *Vern.* 100, *Villers v. Beaumont*.) With respect, however, to chattel interests, an agreement under seal imports a consideration at law. In *Beard v. Nuthall*, (1 *Vern.* 427.,) a bond, though voluntary and without consideration, was supported by a decree; and the Master of the Rolls, in 3 *P. Wms.* 222., spoke to the same effect as to a

voluntary bond. But it will be sufficient, on this subject of aiding voluntary agreements, to recur to the distinction declared by Lord Eldon, in *Ellison v. Ellison*, (6 Ves. 662.) as being one which reduces this point to something like established rule. If you want, according to that distinction, the assistance of chancery to raise an interest by way of trust, on a covenant, or executory agreement, you must have a valuable or meritorious consideration; for the court will not constitute you *cestuy que trust*, when you are a mere volunteer, and the claim rests in covenant, as a covenant to transfer stock. But if the actual transfer be made, the equitable interest will be enforced; for the transfer constitutes the relation between trustee and *cestuy que trust*, though voluntary and without consideration. To the same effect was the observation of Sir Joseph Jekyll, in *Lechmere v. Earl of Carlisle*, (3 P. Wms. 222.,) that every *cestuy que trust*, though a volunteer, and the limitation without consideration, was entitled to the aid of a court of equity.

The deed in question, in this case, was an actual creation of the trust and transfer of the specified interest; and no doubt can arise under the above distinction, even independent of the operation of the instrument as a deed, that this court ought to give it effect and performance.

If it was necessary to go further on this point, I should be induced to say that the facts appearing in the bill and answer amount to proof of a consideration. One of the plaintiffs is an infant and natural child of the grantor; and the other is the mother of the child, who had resided in the house of the grantor, having the charge of his family for as much as fifteen years prior to the date of the instrument, and while the grantor was, during that time, passing from the age of 55 to that of 70 years. It appears to me that, under these circumstances, the grantor, a man of very large fortune, was bound, in reason and justice, to make competent provision for the mother and the child. *Past seduction* has been held a valid consideration to support a covenant for pecuniary re-

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paration; and the innocent offspring of criminal indulgence has a claim to protection and support, which courts of equity cannot, and do not, disregard. It may be truly said, *Non obtusa adeo gestamus pectora.* In the cases of the *Marchioness of Annandale v. Harris*, (2 P. Wms. 432. 3 Bro. P. C. 445.,) of *Cray v. Coke*, (*Cases temp. Talbot*, 153.,) and of *Cary v. Stafford*, (*Amb. 520.*,) settlements by way of voluntary bond, covenant, or deed, as the *præmium pudicitia*, were established, and a specific performance decreed.

I have no doubt that the plate, in the use of the family, is embraced by the words household goods and furniture. (*Roper on Legacies*, vol. 2., 239. 249—255., where the authorities are collected.) I shall, accordingly, decree, that the plaintiff, *Hannah Curry*, elect, in the presence of a master, such portion of the household goods and furniture (plate included) as shall be deemed sufficient by her, with the approbation of such master, towards furnishing a house in a genteel style, having due regard to her circumstances and condition in life. That the lease alluded to in the said instrument be deposited with the assistant register; and that the residue of the furniture and household goods be delivered over to the guardian of *Mary Bunn Marston*, to be preserved for her use; and that, until further order, the assistant register take charge of the rents and profits of the house and lot mentioned in the said instrument, and apply the same as therein directed.

Decree accordingly.

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MOVAN
v.
HAYS.

*Jan. 16th.*MOVAN AND WIFE *against* HAYS.

The assignees of an insolvent, who had obtained his discharge under the insolvent act, must be *parties* to a bill, brought to enforce the execution of an agreement, or trust, relative to his estate, existing prior to his assignment. A re-assignment to the insolvent, by his assignees, of all the residuary interest in his estate, made without the assent of the creditors of the insolvent, interested in the *residuum*, is void.

Parol evidence is inadmissible to support an agreement set up in contradiction to a deed. Where no *trust* appears on the face of a deed, nor any manifestation or evidence of it by *writing*, *parol* evidence is inadmissible to show the trust.

THE plaintiffs, by a deed, dated the 5th of *January*, 1799, conveyed to the defendant, in *fee*, a house and lot in *New-York*, for the consideration of 2,500 dollars, subject to two mortgages; one to *T. Gardner*, for 600 dollars, and one to *John Jones*, for 650 dollars; the deed was in the usual form, with full covenants and warranty, except as to the mortgages specified, and was duly acknowledged by the grantors, and recorded the 16th of *July*, 1801. The defendant, on the 5th of *January*, 1799, executed a mortgage of the same premises to the plaintiffs, for securing the sum of 1,248 dollars and 50 cents, with interest, in one year, which was in the usual form, with a power of sale, &c. &c.; was acknowledged the same day, and recorded *July 13, 1810.*

The plaintiffs, in their bill, alleged that the plaintiff, *E. Movon*, being desirous to raise the sum of 1,200 dollars, it was agreed that he should make 20 promissory notes, each for the sum of 60 dollars; each payable three months after the other, and that the defendant should endorse them; and that, as security to the defendant, he should make the above conveyance in *fee*, to the defendant, and as a counter security, take a mortgage from him, which agreement was

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carried into effect, by executing the deed and mortgage above mentioned, and making and endorsing the notes. That the defendant immediately took possession of the premises so conveyed to him, and was in receipt of the rents and profits, which amounted to 375 dollars per annum. That the first four notes which became due, were paid by the defendant with money furnished to him by the plaintiff, *Movan*, for that purpose ; and the other sixteen notes were taken up successively by the defendant, and paid out of the rents and profits of the house and lot so conveyed to him. That since the notes have been paid, the defendant refused to deliver up the deed, or to reconvey the premises, or to account for the rents and profits, after deducting the notes so paid by him, &c. : and the plaintiffs prayed that the defendant might be decreed to deliver up and cancel the deed, or reconvey the premises, and account for the rents and profits, &c..

The answer of the defendant denied the *agreement* stated in the bill, or that any such notes, relative to the premises, or the price of the conveyance, were endorsed by him ; and he denied that the deed was executed in pursuance of any such agreement, or delivered in trust, or on any condition, or with any promise to be void, or subject to any right of redemption, but was executed upon a fair and absolute purchase, for the consideration expressed, and without any condition or trust whatever. That the defendant has paid off and discharged the two mortgages with which the premises were charged ; that he actually paid the whole consideration money of 2,500 dollars ; that, to secure a part of it, at the time, to wit, the sum of 1,248 dollars and 50 cents, he executed the mortgage of the premises, which he had paid off and discharged, though, by mistake, the mortgage was left in the hands of the plaintiff, and the registry was uncancelled. That, in part of the consideration money, he made and delivered to the plaintiff 20 promissory notes for 60 dollars, payable at different times; but one of

the notes was for a different sum, and they amounted in the whole to 1,248 dollars and 50 cents, all of which he had paid with his own money, either to the plaintiff, or to those to whom he had passed them, and most of them to the assignees of the plaintiff, who had been discharged under the insolvent act. That on receiving the deed, he took possession of the property, and received the rents and profits as his own; that he kept no account of the annual income, but it did not exceed 300 dollars per annum.

The defendant, also, insisted on the benefit of the statute of frauds, against any parol agreement, or trust, set up by the plaintiffs; and, also, that the plaintiff, *Movan*, having assigned all his property under the insolvent act, and obtained his discharge, on the 14th of *August*, 1799, that discharge was a bar to this action.

It is unnecessary to state any portion of the mass of *parol evidence* taken in the cause, it being regarded by the court as wholly inadmissible.

Among the deeds and exhibits, read at the hearing, was a power of attorney to *E. Movan*, from his assignees, dated the 16th of *January*, 1804, to recover all the debts and demands due to them as assignees of his estate, &c.; and a grant and assignment, for the consideration of 1 dollar, dated 16th of *June*, 1807, from the same assignees, to the plaintiff, *E. Movan*, of all their right, as assignees, to the *residuum* of his estate, &c.

T. A. Emmet and Anthon, for the plaintiffs.

Riggs, contra.

THE CHANCELLOR. The objection is well taken that the assignees of *Movan* are not parties to the bill. The interest claimed by the bill passed to the assignees, and though they afterwards re-assigned to *Movan* all the remaining interest of his estate, yet, unless it was done, which does not

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appear in this case, with the assent of all the creditors of *Movan*, having an interest in the estate so assigned in trust, it was a manifest breach of trust, and cannot be regarded as valid.

But admitting the bill to have been brought by the assignees, (and, on this assumed point, to save litigation, my opinion is requested,) yet, as the agreement set up in the bill is denied by the answer, and is contradictory to the deed from the plaintiffs to the defendants, it cannot be supported by parol proof. The statute of frauds is in direct contradiction to this attempt to erect and support a trust by parol evidence. The words of the act are, (act of *February 26, 1787*, s. 12,) that "all declarations or creations of trusts of any lands shall be manifested and proved by some writing, signed by the party enabled by law to declare such trust, or else they shall be utterly void." No doubt the distinction is a just one between an agreement and a trust under the statute of frauds, and that a trust need not, like an agreement, be constituted or created by writing. It is sufficient to show, by written evidence under the party's hand, the existence of the trust. It is sufficient that the trust be manifested and proved by writing, as by a letter acknowledging the trust. (*3 Ves. jun. 707. 12 Ves. 74.*) But the difficulty is, that here is no manifestation, in writing, of any such trust as is charged in the bill. The writings show nothing but a plain absolute deed, in fee, from the plaintiffs to the defendant, for the consideration of 2,500 dollars, and with covenants of warranty; and a plain mortgage, in the ordinary form, from the defendant and his wife to the plaintiffs, with the usual power to sell, and made to secure the payment of a bond for 1,248 dollars and 50 cents, payable in one year thereafter. The deed and mortgage both bear date the 5th of *January*, 1799, and though the deed was recorded in *July*, 1801, the mortgage was not registered until *July*, 1810. To permit such a clear, intelligible, and ordinary transaction, to be changed by parol proof, into the

special trust and agreement set up by the plaintiffs, (and which is the ground of the bill,) would be, in effect, to repeal that part of the statute of frauds to which I have referred. The rule is well established in this court, as well as at law, that parol evidence is inadmissible to disannul or substantially vary a written agreement, except upon the ground of mistake or fraud. The cases of *Irnham v. Child*, (1 Bro. 92.) and of *Hare v. Shearwood*, (1 Ves. jun. 241. 3 Bro. 168.) are not unlike to this; those were cases of an attempt to support, by parol evidence, an agreement to redeem, as having accompanied the grant of an annuity; and the attempt was overruled as being in contradiction to the deed. The case of *Hutchins v. Lee*, (1 Atk. 447.,) on which some reliance seemed to be placed, is not in opposition to this doctrine; for there, as Lord *Hardwicke* observed, all the appearances of an intended trust were upon the face of the deed, and there were declarations and recitals in the deed, consistent with the trust set up, and evidence, or a *manifestation of it*, and therefore the parol evidence was consistent with the deed, and proper to avoid the fraud which was intended.

I should doubt extremely of the sufficiency of the parol proof, if it were admissible; but, without deciding upon its force, I hold it to be utterly inadmissible, as being contrary to the statute of frauds; and the bill must, consequently, be dismissed, with costs.

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Decree accordingly.

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WENDELL
v.
VAN RENSSSE-
LAER.

*Executors and heirs of WENDELL against KILLIAN VAN
Sept. 6, 1814,
and
Jun. 16, 1815.*

RENSSELAER.

A deed by a client to his attorney and scrivener, for the consideration of affection and friendship, and also for a sum of money, though not one third the value of the land conveyed, will not be set aside on the ground of ignorance and blind confidence on the one side, and undue influence on the other, there being no evidence of imbecility or incapacity in the grantor, nor of fraud or imposition by the grantee; nor of that relationship between the parties, which might imply the existence of an undue influence.

Where a person having a conveyance of land, keeps it secret for several years, and knowingly suffers third persons, afterwards, to purchase parts of the same premises from the grantor, who remained in possession, and was the reputed owner, and to expend money on the land, without giving any notice of his claim, he will not be permitted, afterwards, to assert his legal title against such innocent and *bona fide* purchasers.

THE bill in this cause stated, that *Philip Wendell*, on the 8th of December, 1808, died seized of real estate, &c. in the city of Albany, part of which consisted of a lot of ground in *Court-street*; 10 acres of land, called *Wendell's Pasture*, and lots No. 3. and No. 2., on the east side of *Beaver-street*. By his last will, he authorized his executors to receive the rents and profits of his real estate, to lease the same, and, out of the rents and profits, to support his children, &c. That the defendant pretends to have some claim to the above-mentioned property. That the testator, with the knowledge of the defendant, and after the existence of his pretended claim, conveyed one of the lots on *Beaver-street* to *C. R. & G. Webster*, with covenants and warranty, &c.; and they, with the knowledge of the defendant, made valuable improvements thereon; and that the defendant had brought an action of ejectment for the lot in *Court-street*. The bill prayed for a *discovery* of the defendant's title and claim to the premises, &c., and that the title of the plain-

tiffs may be *quieted* in all the estate of which the testator died seised, &c. and for an *injunction*, &c.

The defendant, in his answer, admitted that the testator died possessed of considerable real estate, &c. and made his will, &c. as stated in the bill: that the testator, long before his death, was in the actual and notorious possession of the lot in *Court-street*, and the lots in *Beaver-street*, and of some parts of the *pasture*: that the part of the pasture cleared by the defendant is vacant, except some ice houses thereon. That the testator, in 1807, or 1808, conveyed the whole or a part of the pasture to *Stewart Lewis*, but without the knowledge of the defendant, as he was ignorant thereof until after the testator's death; and he denied that the testator had any but a life estate in the premises. That the testator, on the 9th of *July*, 1792, contracted and *agreed*, with the defendant, "for the natural love and affection towards his friend," the defendant, "and for the further consideration thereinafter mentioned," to convey to the defendant, his heirs and assigns, for ever, *in fee*, the one half of the *pasture*, &c.; lots No. 2. and 3., in *Nail-alley*, subject to a lease to *Elisha Crane*, and the lot in *Court-street*, &c.; *Provided*, the defendant, or his heirs or assigns, pay to the testator, or his heirs, 940*l.*, within two years; and it was agreed by the parties, that if the testator conveyed the premises to the defendant, the testator was to have the use and income thereof during his natural life. This contract was proved by the subscribing witness, before a master, the 28th of *March*, 1809. The defendant also endorsed on the instrument, that on the 17th of *March*, 1794, the testator had executed a release to him of the lot in *Court-street*; and that on the 6th of *August*, 1794, the testator had executed a deed to him, for the residue of the property mentioned in the contract. The defendant stated, that *W. Yates*, the subscribing witness, was a clerk in his office; and he set forth the deed of the 17th of *March*, 1794, at large, which contained the following recital: "Whereas

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1815. I have made an agreement with my friend, *K. K. Van Rensselaer*, respecting a lot of ground situate in *Court-street*, &c., in consideration of 1,500 dollars, paid to me; and whereas I am to be permitted to take, during my life, the rents of the said lot, in case I should build a house or houses on the same, and to let it as I think proper; and whereas I am to receive at the rate of twenty pounds a year, during my life, from the said *Killian*, his heirs or assigns; and having no children, and possessing a large estate, sufficient to provide for my brothers' and sisters' children, with a desire to comply with the request of my friend and relation, I am inclined to convey as follows." The remainder of the deed was in the ordinary form, for the consideration of 1,500 dollars, with covenants against encumbrances and warranty. This deed, in the handwriting of the defendant, was executed in his office, in presence of a clerk, and two witnesses residing in *Washington* county, then present, but since dead. That the defendant gave the testator a note for the 1,500 dollars, payable in six months, which he afterwards paid: That, before giving this note, he had lent the testator money, for which he held his notes, and when the defendant's account was settled, the testator's notes were set off against it, and the balance paid in cash, and a receipt in full was endorsed on the note of the defendant. That, in further performance of his contract, the testator gave the defendant another deed, dated *August 6th, 1794*, for lots No. 2. and No. 3., in *Beaver-street*, and the *pasture*, or hay land, which are described by metes and bounds; but the quantity of acres was not mentioned. This deed, which was set out at length, was absolute in its terms, with a covenant of warranty, and purported to be for the consideration of 340*l.*: it was in the handwriting of the defendant, and executed in his office, in presence of his clerk, and a neighbour, and was proved by the clerk, before a master, the 21st of *April, 1809*. That the defendant gave a note to the testator for the 340*l.*, payable

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in two months, which he paid when it became due, and took the receipt of the testator endorsed thereon.

That in the winter of 1794, a difficulty arose between the parties respecting the bounds of the land in *Wendell's Pasture*, and the two lots in *Nail-alley*, (*Beaver-street*), as there was no survey or map of the premises ; and on the 17th of *March*, 1794, the testator proposed to convey the lot in *Court-street* immediately, and extend the time of payment, under the contract, for 6 months ; and to have the pasture surveyed, and give a deed for it, if the defendant would pay him interest on the 940*l.* for two years ; and the defendant agreed, instead of the interest on the 940*l.*, to give the testator an annuity of 20*l.* for life, and which was accordingly secured by the recital in the first deed. That the description of the property, in the deed of the 6th of *August*, 1794, was taken from that given by the testator. That the contract and conveyance were all obtained in good faith, and for a valuable consideration, actually paid, and after the testator (who was a bachelor) had offered to convey to the defendant his whole estate, for an annuity, which the defendant had declined. The defendant denied all fraud or imposition, or ill practices in obtaining the deeds. He admitted that the sale to *C. R. & G. Webster*, of the lot in *Beaver-street*, and the improvements thereon, were known to him ; but, from a conversation with *G. W.*, he supposed it was a different lot, or No. 1. That he paid the testator the annuity of 20*l.*, until *March*, 1799, and produced the receipts, which specified 20*l.* for rent. That he refused to pay it, afterwards, until the testator should have the pasture land, and the lot in *Nail-alley*, surveyed and laid out.

A great number of witnesses were examined on both sides, whose depositions, with the exhibits, were read at the hearing. Among the exhibits was a lease from the testator to *John Ogle*, dated the 1st of *May*, 1793, for 16 years, for lot No. 3., (one of the lots mentioned in the contract of the 9th of *July*, 1792, and in the deed of the 6th of *August*,

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CASES IN CHANCERY.

1815. 1794,) which was a printed blank, filled up in the handwriting of the defendant, and its execution witnessed by the defendant and his clerk. Also, a lease from the testator to *Ogle*, for 19 years, of lot No. 4., executed at the same time, and filled up and witnessed in the same manner. There were several other leases for lots No. 7. and 9., filled up, and witnessed in the same manner, by the defendant.

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It was stated by several witnesses, that, after the deeds to the defendant, the testator leased and disposed of parts of the property, and that the writings were drawn by the defendant as his lawyer. That at the date of the contract, and of the deeds, the defendant was the confidential friend of the testator, and transacted business for him, as his lawyer and conveyancer. That the testator was ignorant of the forms of business, close in his dealings, and of a suspicious temper, except towards those in whom he confided, and in whom he placed implicit and unbounded confidence; and that the premises conveyed to the defendant were worth three times the amount of the consideration in the deeds. It appeared, also, that after the contract with the defendant, and conveyances to him, the testator made a contract for the sale of part of his grounds, called *Wendell's Pasture*, with one *Tallman*, part of which ground was comprised in the deed to the defendant; and that he, afterwards, sold and conveyed the same property, or a part thereof, to *Stewart Lewis*; that a dispute about the property arose between the testator, *Tallman*, and *Lewis*, which was public and well known to the defendant; and the controversy was, afterwards, with the knowledge of the defendant, settled by referees; so that *Tallman* became entitled to part of the land sold by the testator to *Lewis*; and as an equivalent therefor, the testator conveyed part of the *pasture*, now claimed by the defendant, to *Lewis*, who has built upon the ground, and made improvements thereon, under the eyes of the defendant, who gave no notice of any claim, nor made any objection to what had been done.

Harrison and Riggs, for the plaintiffs.

Henry, for the defendant.

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The cause was brought on to a hearing, when *Henry*, for the defendant, objected, preliminarily, to proceeding in the cause for want of *proper parties*. The bill was filed for discovery of the defendant's claim to lands owned by the testator in his lifetime, and of which he had conveyed part by deed, with covenants of warranty, to *Charles R. and G. Webster*, and to *R. Gill and D. S. Lewis*, and had died seised of the remainder; and the bill prayed to be quieted in their right as representatives. The objection was, that the above purchasers were not parties, and that the rule was, that all persons having a right or interest concerned, or who may be affected by the decree, ought to be made parties, so that one decree may finally settle all the rights and interests involved in the controversy, and prevent further litigation.

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1814.

The general rule, requiring all persons interested to be made parties to the suit, is confined to parties to the interest involved in the issue, and who must, necessarily, be affected by the decree. It is a rule of convenience merely, and may be dispensed with, when it becomes extremely difficult or inconvenient.

Riggs and Harrison, contra. These purchasers have no interest in some of the lands covered by the defendant's deeds, and claimed by the plaintiffs; and they have no interest in the estate whereof *Philip Wendell* died seised, and which alone is the subject of the bill.

THE CHANCELLOR. The only interest involved in this suit, is that belonging to the representatives of *Philip Wendell*, deceased. Persons who purchased of *Wendell*, in his lifetime, are not concerned in this suit. They may have an interest in the point or question litigated, viz. whether the deeds of the defendant, covering their lands as well as the lands of the plaintiffs, be valid; but that circumstance alone will not render them necessary parties. If all persons interested in lands covered by the defendant's deeds (and which deeds the plaintiffs controvert) were to be made parties, it would be very inconvenient. They may be numerous,

1815. as the lands lie in a populous part of the city of *Albany*; and on that principle a suit involving a question on the validity of some of our largest patents would require all the inhabitants on them to be made parties. The general rule, requiring all persons interested to be parties, ought to be restricted to cases of parties to the interest involved in the issue, and necessarily to be affected by the decree. It is, besides, a rule adopted for convenience merely, and is dispensed with when it becomes extremely difficult or inconvenient. (*Adair v. The New River Company*, 11 *Ves.* 429.) The interest now in contest is that whereof *Wendell* is alleged to have *died seized*; and all persons concerned in that interest are plaintiffs, and that is sufficient. If relief is to be granted, it will, of course, be so modified as not to affect the interest of others. The objection is overruled.

The cause was then argued, on the merits, at great length; but the points and authorities are so fully discussed in the judgment pronounced by the court, that it is thought unnecessary to state the arguments of counsel.

Jan. 16, 1815. The cause stood over for decision until this day, when the following opinion was delivered by the court.

A deed from a client to his attorney and counsel will not be set aside on the ground of any implied existence of undue influence, nor unless fraud or imposition be shown.

THE CHANCELLOR. The deeds set up by the defendant were taken and kept under such circumstances as very naturally to have excited great distrust in the testator's heirs; and it must be confessed that they have been viewed with jealousy by the court. I cannot, however, perceive any sufficient ground, or select any solid principle, upon which I can set them absolutely aside, as unduly or fraudulently obtained. The parties, at the time, did not stand in such relation to each other, as necessarily to render the deeds invalid, on principles of utility or policy, flowing from such relation. The defendant occasionally did small business, as a scrivener, for the testator, but these deeds were not procured or given by way of remuneration or bounty, for antecedent kindness;

they were purchases made, or purporting and shown to have been made, for a valuable, if not a full consideration. There was no connexion, at the time, between the parties, that would justly imply the existence of undue influence, or the *fraus innexa clienti*; and the cases to which I have been referred, (2 *Ves.* 281. 2 *Schoale & Lefroy*, 492. 2 *Ves.* jun. 199. 9 *Ves.* jun. 292. 12 *Ves.* jun. 371. 13 *Ves.* jun. 136. 14 *Ves.* jun. 91. 273.,) of undue influence arising from particular relations between parties, do not seem to apply. Nor have I been able to discover any fraud or imposition practised upon the testator. The evidence will not warrant the conclusion that the testator was too ignorant, or too weak in understanding, to make valid contracts. All the proof in the case shows that he was in the constant habit of dealing, in regard to his property, with the public at large, with ordinary discretion and sagacity. Though the testator may have placed a very strong, and even blind confidence in the defendant, it does not appear that such confidence was excited by any undue arts, or by any relationship between the parties, which will authorize this court to interfere. The bargain seems to have been incautious and injudicious on the part of the testator, if we consider it as a mere pecuniary transaction between strangers dealing at arms length; but it is not to be helped for that cause. The case is not of that gross and extravagant kind, like those of *Hugunin v. Baseley*, and of *Purcell v. McNamara*, (14 *Ves.* 91. 273.,) in which the impression of folly and ignorance on one side, and of undue and overbearing influence on the other, was irresistible. It is, however, a case of so peculiar an aspect, that if I had been able to discover the least *scintilla* of fraud or imposition on the part of the defendant, in procuring the deeds, I should readily have interposed and annulled the transaction; but I see no such imposition; and as between the parties themselves, I conclude that the deeds must be permitted to stand.

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1815. The defendant was to pay the testator an annuity of 20*l.* for life, and this annuity has been suspended since *March, 1799*, by a refusal, on the part of the defendant, to pay. The deed of the *Court-str. et lot*, given in *March, 1794*, recites such an agreement, and the possession of that lot ought not to be taken from the representatives of the testator, until the arrears of that annuity, up to the testator's death, are discharged. I shall, accordingly, retain the injunction, until the amount of those arrears be ascertained by a master, and paid to the executors of *Wendell*, or are brought into court.

With respect to the lands contained in the deed of *August, 1794*, it appears that most of them were conveyed by the testator to third persons, for valuable considerations, and by deeds of warranty, subsequent to the date of the deed to the defendant; and it becomes a very important question, whether, under the circumstances of this case, the court can permit that deed to operate, except upon lands of which the testator died in possession, and which he had not conveyed since the deed of 1794. Perhaps I cannot take any effectual step under the present bill to silence or extinguish the claim of the defendant to the lands conveyed by the testator, though covered by the deed of *August, 1794*; but as the merits of the question are so fully before me, it may be convenient to the defendant that I should express an opinion on the point.

The deed of the 6th of *August, 1794*, has no recital, and is a plain deed, in fee, of all the testator's interest, present and future, although, by the contract of the 9th of *July, 1792*, (and of which this deed was, as the defendant admits, in part performance,) the testator was to retain a life estate in the premises. The deed is inconsistent with that reservation, and does not truly express the intent and meaning of the parties; for all the evidence shows, that the original agreement was never varied on this point, and we find that a life estate was actually enjoyed by the testator. When a deed, as the Lord Chancellor said, in *Walt v. Grove*, (2 *Schoale*

A deed, false in a material point, is not entitled to full credit.

& *Lefroy*, 492.,) is shown to be false in a material point, it cannot have the credit due to unimpeached testimony. It must be reformed, and be set aside in whole or in part, and on such terms as justice may require. In this case, however, as the grantor, notwithstanding the absolute nature of the deed, continued to enjoy the land unmolested down to the time of his death, there was no bad faith as between the parties to the deed ; and the false language of it is a material circumstance only when we come to consider the fairness of the transaction as respects the world, and the weight due to the deed upon purchases made by third persons from the grantor, since its execution. It was not only a deed untrue on its face, but it was carefully concealed from the knowledge of the world ; and throughout all the transactions between the parties, there was an intentional secrecy as to the contract of 1792, and the deeds of 1794. By this means, false colours were held out to the world, and the public were permitted to consider the property as belonging to the testator, and to treat with him as the absolute owner. The various purchases from the testator, made by *Stewart Lewis*, by the *Websters*, by the *Gills*, by *Turner*, and by *Tallman*, conclusively establish this fact. The defendant, in his answer, admits it to be probable, that an opinion very generally prevailed, and was entertained by the inhabitants of *Albany*, that the testator continued owner of the land, between the date of the deed and his death. The purchases made from him, from time to time, of parts of the premises, were matter of public notoriety ; the various and great improvements going on under those purchases were in full view from the very residence of the defendant, and his knowledge of these purchases is, in some instances, admitted or proved ; yet, from 1794 to 1808, he preserved a studied silence, and gave no notice to those purchasers, or to the world, of his title. After this, he cannot be permitted to start up with a secret deed, (in itself of such doubtful credit,) and take the land from *bona fide* purchasers under the testator. Having,

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1815. for such a length of time, suffered the public to deal with the testator as the real owner, he cannot now be permitted to question, or disturb, any title which has thus been procured by his tacit assent. There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend

A person looking on and suffering another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound not to be permitted, afterwards, to assert his legal title against such innocent purchaser.

by this equitable estoppel. *Qui tacet, consentire videtur. Qui potest et debet vetare, jubet.* (*The East-India Company v. Vincent*, 2 *Atk.* 83. *Hanning v. Ferrers*,¹ *Eg. Cas. Abr.* 356. pl. 10. *Gilbert's Eg. Cas.* 83. *Raw v. Potts, Prec. in Ch.* 35. *Hunsden v. Cheyney*, 2 *Vern.* 150., and the case of *Dr. Amyas*, there cited. *Styles v. Cowper*, 3 *Atk.* 692. *Jackson v. Cator*, 5 *Ves.* 688. *Dann v. Spurrier*, 7 *Ves.* 231.) Though the right of the party, who thus misleads third persons by his silence, be merely a reversionary interest, subject to a life estate in the person whom he suffers to act with the property as owner, yet, as appears from several of the cases, the application of the principle is the same.

The following decree was entered:

“ That the deed of conveyance in the pleadings and proofs mentioned, from *Philip Wendell*, deceased, to the defendant, bearing date the 6th day of *August*, 1794, for two certain lots of ground therein described as Nos. 2. and 3., situate in the first ward of the city of *Albany*, fronting the new street called *Wendell-street*; and for a piece of pasture, or hay land, therein also described, as situate in the first ward of the city of *Albany*, has become, and is, void and inoperative in law, as far as the same deed comprehends, or relates to, lands and premises therein mentioned and described.

or thereby intended to be conveyed, and which the said *Philip Wendell*, deceased, in his lifetime, after the day of the date of the said deed, conveyed to any other person or persons, *bona fide*, for valuable consideration. And it satisfactorily appearing to this court, from the pleadings and proofs in the cause, that *Philip Wendell*, deceased, in his lifetime, and after the 6th of August, 1794, conveyed, as aforesaid, in fee simple, to third persons, all the lands and premises in the aforesaid deed mentioned and described, and thereby intended to be conveyed, excepting lot No. 2., fronting on the street called *Wendell-street*: Whereupon, it is further ordered, adjudged, and decreed, that the defendant, *Killian K. Van Rensselaer*, shall execute and deliver to the plaintiffs in this cause, a release, sufficient in the law, to release, exonerate, and discharge the plaintiff, as the real and personal representatives of *Philip Wendell*, deceased, from the covenant of warranty, in the deed of conveyance contained; and from all covenants, expressed or implied, in the said deed of conveyance, which would, or might, render the plaintiff, any, or either of them, as real or personal representatives of *Philip Wendell*, deceased, liable to the defendant, his heirs, executors, administrators, or assigns, for the title of the lands and premises in the deed mentioned and described, or thereby intended to be conveyed, except as to lot No. 2., and from all damages in consequence of a failure of such title; and that the form of such release be settled by a master in chancery, in case the parties disagree respecting the same. And it is further declared, adjudged, and decreed, that the deed of conveyance, from *Philip Wendell*, deceased, to the defendant, of the 6th of August, 1794, and the covenants therein contained, as far as regards lot No. 2., remains in full force, as it respects the plaintiff in this suit, any, or either of them. And it is further ordered, adjudged and decreed, that the other deed of conveyance, in the pleadings and proofs mentioned, from *Philip Wendell*, deceased, to the defendant,

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v.
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LAER.

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bearing date the 17th of *March*, 1794, for a certain lot of ground therein described, as situate adjoining *Court-street*, in the first ward of the city of *Albany*, is unimpeached, and remains effectual according to the tenor thereof, and is hereby declared to be established against the plaintiffs; and to the benefits whereof the defendant shall be entitled, to take effect as hereafter mentioned, and hereafter to be provided for and decreed. And it is further ordered, adjudged, and decreed, that the plaintiffs are entitled to, and do recover and receive from the defendant, the annuity or yearly sum of 50 dollars, which it appears, from the pleadings and proofs in the cause, the defendant agreed to pay to *Philip Wendell*, during his life, and which yearly sum the defendant paid to *Philip Wendell*, up to the 17th of *March*, 1799, and no longer. And for the purpose of ascertaining what is due to the plaintiffs for the arrears of the annuity, or yearly sum, it is further ordered, adjudged, and decreed, that it be referred to a master in chancery, to take and state an account thereof, from the 17th of *March*, 1799, until the 8th of *December*, 1808, when *Philip Wendell* died; and that the master, in taking and stating the account, compute and allow interest on each of the yearly sums, from the time the same ought to have been paid until the report; and that the master, also, take an account of the rents and profits of the lot of ground and premises, situate adjoining *Court-street*, in the first ward of the city of *Albany*, which have been received by the plaintiffs, *Barent Bleeker* and *Sanders Lansing*, as executors of the last will and testament of *Philip Wendell*, deceased, from the decease of *Philip Wendell*; and in taking such account, the master shall make all just allowances for improvements, permanently useful, made upon the last mentioned lot of ground by *Philip Wendell*, in his lifetime, after the 17th of *March*, 1794, and which now remain; and that he, also, make all just allowances for improvements, permanently useful, repairs and taxes, or other necessary and proper expenditures by the plaintiffs upon, or an account of, the lot

of ground and premises, since the decease of *Philip Wendell*; and that the master report thereon with convenient speed. And it is further ordered, that the injunction issued in this cause be continued until the master's report shall come in, and till further order; and that the question of costs, and all further directions, be reserved for the further consideration of the court."

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v.
LIVINGSTON.

TEN BROECK against W. T. LIVINGSTON.

January 23d.

Where a deed, in fee, contained a reservation of the right of "cutting and hewing timber, and grazing in the woods not appropriated or fenced in;" it was held, that the right reserved ceased as soon as the premises were fenced in by the grantee, especially, where it appeared that the premises had been enclosed for above 30 years, and the right, during that period, had not been claimed or exercised.

Such rights may be lost by long negligence and disuse; and presumptions of their release, or discharge, are favoured for the sake of quieting possessions.

Where A. contracted to convey to B., "by a good and valid conveyance in law," a farm, which was originally parcel of a large tract of land granted by the proprietor of a manor, to the ancestor of A., in fee, "yielding and paying to the grantor, his heirs and assigns, the yearly rent of ten shillings;" the proportion of which *quit rent* on the farm, was 54 cents a year; the existence of the quit rent being known to B. at the time of the contract, it was held that the existing of such an encumbrance, if it was any, was no objection to a decree of specific performance of the contract.

Whether such a *quit rent*, not having been demanded or paid for above 60 years, will not be presumed to be become extinguished by lapse of time?

Quere.

THIS was a bill for a specific performance of an agreement, under seal, made between the parties, on the 22d of December, 1812, by which they agreed to exchange the farms specified in the agreement, and to execute to each other "good and valid conveyances in the law of the same," with covenants of seisin and warranty; and they agreed further to refer it to J. R. V. R., and J. C. H., to arbitrate and

1815. ~~THE BACON~~ ~~v.~~ ~~LIVINGSTON~~ assess the relative value of the farms, and what sum, if any, the defendant should pay to the plaintiff, to render the exchange equal ; and that mutual possession of the respective farms should be delivered on the 1st of *April*, 1813. The arbitrators made an *award*, on the 8th of *January*, 1813, that the defendant should, within four years from the 1st of *April*, 1813, pay to the plaintiff 10,750 dollars, with interest annually, from that time, and give good security for the payment. The bill further stated, that the plaintiff caused his farm to be surveyed ; that the defendant, wishing to get rid of the bargain, offered the plaintiff one hundred dollars to relinquish it, which he refused. That before the 1st of *April*, 1813, the defendant brought on the plaintiff's farm, rails and boards ; and the plaintiff also expended money on the defendant's farm, in confidence that the agreement would be fulfilled. Both parties requested an attorney to prepare the deeds ; and the plaintiff executed his deed, and tendered it to the defendant on the 13th of *March*, 1813; but the defendant refused to perform the agreement, or abide by the award of the arbitrators ; and the plaintiff again, on the 1st of *April*, 1813, tendered his deed to the defendant, who refused to accept it.

The answer of the defendant admitted the agreement and award, as stated in the bill ; but alleged, that after the publication of the award, he discovered that *Robert Livingston*, who owned the plaintiff's farm on the 20th of *October*, 1694, conveyed to *Dirck Wessell*, (a) (ancestor of the plaintiff,) for the consideration of 15*l.*, a tract of land, including the plaintiff's farm, in fee, the grantee "yielding and paying to the grantor, his heirs and assigns, the yearly rent of 10 shillings," and with a *reservation* to the grantor, his heirs and assigns, for ever, of the right of "cutting and hewing timber, and grazing in the premises, that is to say, in the woods

(a) This is one instance, among many, of the singular changes which have taken place in the names of the Dutch families in this state.

not appropriated or fenced in." And the defendant therefore charged, that the plaintiff's farm was subject to the above rents and reservations ; and that those encumbrances were unknown to the arbitrators when they made their award ; and that all the declarations and acts of the defendant, towards ratifying the contract and award, were made and done before he discovered the above encumbrances on the plaintiff's farm.

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v.
LIVINGSTON.

The master to whom it had been referred to report on the titles of the parties, &c., reported the evidence taken before him. It was proved that the farm of the plaintiff had been enclosed or fenced in for above 31 years ; that a small spot of 3 or 4 acres, called the *Ogden* spot, formerly not fenced in, had been, for several years, improved, and was now fenced in, and in the occupation of the plaintiff. That it was notorious that all the lands in the manor of *Livingston* are held subject to quit rents ; and that the defendant had frequently said, before the agreement, that he knew of the existence of the quit rent, which was a trifling sum. That the plaintiff had never been called on for any quit rent. That there were 250 acres of woodland on the farm, not cleared, and the right to cut wood had never been exercised.

The report also stated, that the quit rent on the farm amounted only to 54 cents a year ; and that, from the *manor books*, it did not appear that any quit rents had ever been exacted or paid.

Henry, for the plaintiff, contended, that the reservation, as to cutting timber, &c., in the title deed of the plaintiff, applied only to lands not fenced in ; and as the whole farm had been enclosed for more than 30 years, there was an end to the reservation. Besides, it was proved that the right had never been exercised during a period of more than 100 years, which had elapsed from the time of making the grant : and it must, therefore, be presumed to have been

1815. extinguished by release. (1 *Fonbl. Equ.* 319. b. 1. ch. 4.
 s. 27. n. 2. 1 *Vern.* 32. 2 *Atk.* 67. 632. 3 *P. Wms.*
TEN BROEK v. LIVINGSTON. 266. 2 *Ves. jun.* 583.)

The quit rent reserved was apportionable, and the report of the master makes it no more than 54 cents a year. It rests in covenant merely : and the maxim, *de minimis non curat lex*, is fairly applicable. Besides, as it has never been demanded, the presumption is that it has been extinguished. (*Francis's Maxims*, 40. pl. 9. 2 *Vent.* 351, 352.)

E. Williams, contra, contended, that as the plaintiff could not convey a clear and *perfect title* to all his farm, the defendant was not bound to accept the deed, or to perform the contract on his part. The tender of a good *deed* is not enough ; there must be a good *title* to the whole of the premises. (2 *Johns. Rep.* 612.) The plaintiff could not, in this case, recover damages at law for the non-performance of the contract by the defendant. (*Jones v. Gardner*, 10 *Johns. Rep.* 266.) A court of equity will not, therefore, decree a specific performance. (1 *Fonbl.* b. 1. ch. 3. s. 1.)

But is there ground for the presumption, that the rents and reversion have been released ? There can be no adverse possession, in this case, to afford the legal presumption. The plaintiff shows the source of his title, and spreads out before the court his whole title. The law will not presume a grant or release in such a case. (*Hull v. Horner*, *Camp.* 102.) *Mere length of time* is not sufficient ground to create a *bar* to quit rents, unaccompanied by other circumstances. A presumption from length of time to support a right, is different from a presumption to defeat a right, as in this case. In *Eldridge v. Knott*, (*Camp.* 214.), where the *quit rent* was only 2*s.* and 6*d.*, the court would not presume a release or extinguishment, from the lapse of time, short of 50 years, the period fixed by the statute of limitations. It appeared from the manor books, that rent was paid to 1768, and charged down to 1790.

Henry, in reply, said, that the *quit rents* reserved in these and similar cases, were intended merely as recognitions of *memorial seigniory*, not as any beneficial rent. So all the *colonial grants* before the *American revolution*, from the crown or government, contained reservations of *quit rents*, as badges of tenure, or acknowledgments of sovereignty; and not with a view on the part of the government to derive any pecuniary benefit from the reservation; and there was no instance where such quit rents had been demanded by the crown from the colonial patentees.

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TER BROCK
v.
LIVINGSTON.

The question, in this court, is, can the party make a good and operative title? The reservation to cut wood and graze applied only to the woods lying in *common*, and ceased as soon as they were appropriated and enclosed. A prescription will run between tenants in common; and equally so between landlord and tenant. There is no evidence of any payment of rent in 40 years, but merely of a charge in the manor books.

No suit at law would lie to recover this rent. At any rate, it is a case for compensation, and affords no ground to refuse a decree for a specific performance.

THE CHANCELLOR. The master reports, that the parties, respectively, can make a good title to each other for the premises mentioned in the submission and award. But the defendant objects to the goodness of the plaintiff's title, on two grounds: 1. That the lands are charged with an encumbrance reserved in the deed of the 26th of *October*, 1694, from *Robert Livingston* to *Dirck Wessells*, the ancestor of the plaintiff. By this deed, which was for a tract of land of which the premises were only a part, the grantor reserved to himself, and his heirs and assigns, the right of cutting timber, and of grazing, in the woods "*not appropriated or fenced in.*" 2. That the deed contained, also, a reservation to the grantor, and his heirs and assigns, of the yearly rent of 10s.

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TEN BROECK
v.
LIVINGSTON.

1. With respect to the first objection, it appears to me to be the true construction of the grant, that the reservation ceased and became extinguished, as to the lands belonging to the plaintiff, when those lands were enclosed by fence, and reduced from the state of common lands to that of specific and exclusive appropriation. It was proved before the master, that excepting the small *Ogden* spot, which was more recently enclosed, all the plaintiff's farm had been under fence for above 30 years, and that the exercise of the right reserved by the deed had not been claimed or asserted within that period of time. It cannot be supposed to have been the intention of the reservation, that the lands should always continue subject to that *servitude*, however appropriated by the owner; for this would be giving to the grantor a right repugnant to the nature of the grant itself, and to the absolute and beneficial ownership which an estate in fee was intended to convey. By construing the words according to their obvious and natural sense, we give to the reservation a reasonable operation, and one consistent with the interest of the grantee. It was no more than a right of common, and that right is utterly inconsistent with the exercise of the right of enclosure. The plaintiff either had no right to appropriate and fence in the woods, or the right of cutting and grazing ceased as soon as the woods were actually and *bona fide* enclosed. The long disuse of this right, if even it was used, is evidence of the sense of the parties that the right ceased when the woods were fenced in; and a right of this kind, as well as other rights, may be lost by long negligence and disuse. This was so said in *Gateward's* case, (3 *Leon.* 202.) It will let in the presumption of a release, or other discharge, and such presumptions are to be favourably received in opposition to dormant claims, because they conduce to the quiet of titles, and the security of estates; and this argument would be entitled to weight, if the construction which I have given to the grant was insufficient or doubtful.

2. The other objection founded on the quit rent, cannot be admitted to be set up in this case. The covenant that each party was to make a "good and valid conveyance in the law," will be satisfied if the party can make a good title, subject to that portion of the nominal quit rent of 10*s.*, which might fall upon the premises of the plaintiff. It appears that this reservation of rent was well known to the defendant when he made the contract; it was a matter, also, of public notoriety, that all the lands in the manor, were subject to such a quit rent. It was never, then, within the contemplation of these parties, that this rent was to form an obstacle to title. The quit rents due to government, under all colonial grants, might as well be set up as an objection to the performance of any covenant to convey. This rent was declared to be in lieu of all other rents, and was evidently, as the counsel observed, nothing more than the recognition of the manorial seigniory, and which, at that early day, was deemed a matter of some importance. On a due apportionment of that rent, if it was now to be collected, the burthen, or part, falling on the farm of the plaintiff, would be but fifty-four cents a year. As I do not consider this rent as forming any obstacle to the mutual good title intended by the contract of the parties, it becomes unnecessary to agitate the question, whether the rent itself has not become extinguished by lapse of time, owing to the presumption arising from the want of evidence of its having been demanded, or paid, for the last 60, if not 100, years.

I shall, accordingly, decree a specific performance of the agreement of the parties, mutually to convey. The only remaining point is, whether the defendant is to be charged with interest on the 10,750 dollars, from the 1st of April, 1813. If he is to be so charged, then there ought to be an account taken of the rents and profits of the respective farms for the last two years. But as each party has continued in the possession of their respective original farms, and as the farm of the plaintiff is to be considered as exceeding in value

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1815.

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DENTON  
v.  
DENTON.

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the defendant's farm, to the amount of 10,750 dollars, I think it would be just and equitable to leave each party in the enjoyment of the rents and profits which he has hitherto received, and that interest on the sum should not commence until the titles and possessions are exchanged. The decree will then be, that the parties mutually convey and deliver possession by the 1st of *April* next, and that the defendant pay to the plaintiff, in two years from that day, the 10,750 dollars, with interest, annually, from the 1st of *April* next, and give security according to the award; and that, in the mean time, neither party commit waste on the premises of which they are now in possession; and that the defendant pay to the plaintiff his costs of this suit, to be taxed.

Decree accordingly.

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Feb. 23d.

## MARY DENTON against S. DENTON.

Where a wife had filed a bill for *alimony*, &c. against her husband, and it appeared that he had abandoned her without any support, and threatened to leave the state, the court, on the petition of the wife, granted a writ of *ne exeat republica* against the husband.

Pending a bill for a divorce by a wife against her husband, and before answer, the court will allow a monthly sum to the wife as *alimony*, and also a sum to be paid to her, by her husband, towards defraying the expenses of her suit.

THE petition of the plaintiff stated, that, in January last, she filed her bill against the defendant, setting forth that she was married to the defendant on the 25th of October, 1795, in this state, and that they were then, and still are, citizens and residents of this state. That, on the 20th of *April*, 1814, the defendant broke up housekeeping, though, for years before, his annual expenses for housekeeping were between

4 and 5,000 dollars. That the defendant abandoned the plaintiff without home or support, and had since treated her with great cruelty and persecution, and denied her all support: that she had no means of living: that the defendant was a man of large fortune, and threatened to leave the *United States*. And she prayed a writ of *ne exeat*, and a writ of *supplicavit*, to restrain the defendant from disturbing her retreat, and for security, and for money to prosecute the suit, and also for a weekly or monthly allowance. The bill for a divorce was filed, but no answer was yet put in.

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DENTON
v.
DENTON.

The facts stated in the petition were supported by *affidavits*, from which it also appeared that the defendant was a man of fortune, and worth above 200,000 dollars.

T. Sedgwick, for the petitioner, cited 2 *Burns' Ecc. Law*, 432. *Gibson's Codex*. 445. 1 *Oughton Ordo Jud.* 306. 309. *Ambler*, 63. *Sid.* 118. 2 *Atk.* 210.

THE CHANCELLOR. The bill filed in this cause states matter properly cognizable in equity. It is as well for *alimony* as for other relief. The allowance of a *ne exeat*, when the husband threatens to leave the state, and his wife without any support, is essential to justice, and has been granted in like cases. (2 *Atk.* 210. *Amb.* 76. *Dickens*, 154.) From what was said in the case of *Mix v. Mix*,* as well as from the cases now cited, the rule appears to be, that the wife who is under the necessity of carrying on a suit against her husband, or of defending one against him, is entitled, as well to a reasonable allowance to be paid by the husband for the necessary expenses of the suit, as to an allowance for *alimony* pending the prosecution.

* *Ante*, p. 109.

I shall, accordingly, allow the *ne exeat*, and direct security under it to be taken, in the sum of 25,000 dollars, and shall, also, allow at the rate of 100 dollars per month, for *alimony*, and the further sum of 250 dollars, to be paid by the defendant to the plaintiff, or to the register, or assistant register, on her

1815. behalf, towards defraying the necessary charges of the suit,
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**BRUMLY**  
v.  
**WESTCHESTER  
MANUFAC.  
SOCIETY.**

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*Feb. 27th. BRUMLY against THE WESTCHESTER COUNTY MANUFACTURING SOCIETY.*

Individual members of a *corporation* may be called upon to answer to a bill of discovery under oath; but in that case, the individuals must be named as defendants in the bill.

Where a bill was filed against a corporation generally, who put in an answer under their corporate seal, the court refused, on motion, to order certain officers of the corporation to make oath to the answer so filed.

MOTION, on the part of the plaintiff, that *the answer filed by the defendants be sworn to by Richard Ward, president, and John Bonnett, jun., secretary, of the said society, and by Philemon Halstead and Ichabod Prall, directors thereof.*

The motion was accompanied with an affidavit of the solicitor, stating that the bill was filed on the 14th of October last, and that on the 28th of January last, the answer was filed under the seal of the defendants, and signed by the president and secretary, but not sworn to.

*Dyckman*, for the plaintiff.

*Colden*, contra.

THE CHANCELLOR. It does not appear that this is a bill merely for discovery of writings, as was the case in 1 *Vern.* 117.; and if it was, the case would not warrant the motion that the defendants named should swear to the very answer put in, on behalf of the corporation. The principle is established by that and by other cases, (*Wych v.*

*Meal, 3 P. Wms. 310., and Dummer v. Corporation of Chippenham, 14 Ves. 245.)* that the court will call upon individual members of a corporation to answer not only with the rest under the common seal, but individually, upon oath; but in those cases the defendants, whose discovery under oath was sought, were named in the bill as defendants. The application, therefore, in its present shape, must be denied, with costs.

1815.

ROGERS  
v.  
RATHBUN.

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Motion denied.

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ROGERS against RATHBUN.

March 7th.

On a bill for discovery, on a charge of *usury*, an injunction will not be granted to stay proceedings at law on the note, or usurious contract, unless the plaintiff tenders, or brings into court, the money actually lent, and the *lawful interest* thereon.

BILL for an injunction, charging that the plaintiff applied to the defendant, on the 16th of *March*, 1812, for the loan of 500 dollars, and agreed to give him at the rate of 11 per cent. interest, and to execute a negotiable note, with *Beriah Palmer*, as endorser, payable in six months. That the agreement was carried into effect, and, on giving the note, the plaintiff paid to the defendant interest, at the rate of 11 per cent. per annum; that the defendant has commenced a suit on the note in the supreme court.

The bill called on the defendant to answer to the above charge, and prayed for an injunction and *subpæna*, and for general relief; and expressly waived all forfeitures to which the defendant might be liable by reason of the premises.

THE CHANCELLOR. The bill prays for a discovery of the usury charged, and, consequently, to subject the defend-

## CASES IN CHANCERY.

1815. *VAN VECHTE N*, for the plaintiffs, moved to have a decree of *forfeiture* at law of his whole debt; and as the bill does not contain an offer, or tender, of the sum actually borrowed, with the lawful interest, after crediting the eleven per cent. already advanced, the motion cannot be granted. It is a settled principle, that he who seeks equity, must do equity; and if the borrower comes into this court for relief against his usurious contract, he must do what is right, as between the parties, by bringing into court the money actually advanced, with the legal interest, and then the court will lend him its aid as against the usurious excess. To compel a discovery, without such offer, would be against the fundamental doctrine of this court, which will not force a discovery that is to lead to a forfeiture. (*Bosanquet v. Dashwood, Cases temp. Talbot*, 38. *Fitzroy v. Gwillim*, 1 Term Rep. 153. *Viner, tit. Usury*, 315. *Chancery v. Takeurden*, 2 Atk. 393. *Earl of Suffolk v. Green*, 1 Atk. 450.)

Injunction denied.

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**TRUSTEES, &c. OF KINGSTON against TAPPEN.**

A witness who has been examined before a commissioner, by consent of parties, on affidavit that his testimony was not truly taken down by the commissioner, who had mistaken it materially, was ordered to be re-examined before the examiner, there being no suggestion of any tampering with the witness.

*VAN VECHTE N*, for the plaintiffs, moved to have the deposition of *Moses Gomans*, a witness on the part of the plaintiffs, taken before a commissioner appointed by consent of the parties to examine witnesses on both sides, amended, upon affidavit of the witness, stating, that his testimony, as taken down by the commissioner, was materially

mistaken, in certain particulars stated, and not truly taken down.

1815.

TRUSTEES OF  
KINGSTON  
V.  
TAPPEN.

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*I. Hamilton*, contra, read the affidavit of the commissioner, that the testimony of *Gomans* was truly and accurately taken down as he gave it, and distinctly and audibly read to him afterwards, and before he subscribed it. He also read the affidavits of two other witnesses, as to what the witness had declared that he knew before he was sworn.

**THE CHANCELLOR.** Here is no suggestion of any tampering with the witness, and I am bound to presume there is a mistake or misapprehension on one side or the other. The cases of *Griells v. Gansell*, and of *Darling v. Staniford*, (2 P. Wms. 646. *Dickens*, 358.,) show, that re-examinations have been allowed in such cases; and, in the latter case, the court took the re-examination from the examiner into their own hands. Let the witness be re-examined before one of the examiners of the court.

Rule accordingly.

## CASES IN CHANCERY.

1815.

BENEDICT  
v.  
LYNCH.

## BENEDICT against LYNCH.

*April 1st.*

A bill for a specific performance of an agreement will not be sustained where the remedy is not mutual, or where one party only is bound by the agreement.

In the sale of lands, time may make part of the essence of the contract, and on default at the day, without any just excuse, or any acquiescence, or subsequent waiver by the other party, the court will not help the party in default.

Where A., in *March*, 1810, agreed to purchase a farm of B., and to pay 250 dollars in one year; one third of the residue of the purchase money in one year thereafter; and the other two thirds in the two successive years; and on the payments being made, B. was to give a deed; and if he failed in the payments, or either of them, the agreement was to be void: and A. entered into possession under the agreement, and made improvements, but made no payments; and B., in *October*, 1813, above two years after the first default, supposing the agreement void or abandoned, sold the farm to a third person; a bill filed by A., in 1814, on a tender of the whole purchase money, for a specific performance of the agreement, was dismissed with costs. If a deed, after mentioning a specific consideration, adds, "and for other considerations," it seems, that parol evidence is admissible to show what were those other considerations.

THIS was a bill for the specific performance of an agreement for the sale of the land. The plaintiff stated, that, on the 28th of *March*, 1810, he contracted with the defendant for the purchase of land, described in the agreement signed by the defendant, which was as follows: "that it was thereby agreed between the parties, that the defendant sell to the plaintiff a piece of ground, (described therein,) containing 39 acres, at 14 dollars and 50 cents per acre, and upon the following conditions being performed, to wit, that the plaintiff pay to the defendant 250 dollars in one year; (*March*, 1811;) one third of the remainder in one year thereafter; (*1812*;) one third in the next year; (*1813*;) and the balance in the year following, (*1814*,) with interest, annually, on all the sums; and upon his complying with the payments, the defendant agreed to give a deed. If the plaintiff

failed in the payments, or any of them, the agreement to be void." That the plaintiff made and delivered to the defendant a counterpart of the agreement.

That the plaintiff took immediate possession of the land, cleared eight acres, and built a house thereon; but, in consequence of unforeseen disappointments, failed to make his payments. That in order to induce the defendant not to sue him for the purchase money, the plaintiff, subsequently to the above contract, agreed with the defendant to clear five acres in one year, and, in consideration thereof, the defendant promised not to prosecute the plaintiff during that year.

That he had since procured and tendered (in *January, 1814*) all the purchase money, to the amount of 720 dollars, though the whole of it was not due; but the defendant refused to accept the money, alleging, that the contract was void, and had brought an action of ejectment against the plaintiff.

The plaintiff prayed for an injunction, which was granted, *March, 12th, 1814*, on the plaintiff's depositing the 720 dollars with the register.

The answer of the defendant admitted the agreement of the 28th of *March, 1810*, and that it was without any other consideration than what was therein stated; but denied the delivery by the plaintiff of any counterpart of the agreement. The defendant admitted the entry of the plaintiff on the land, and the erections and improvements made by him, which he had enjoyed and used, down to the time of the answer, without offering any compensation to the defendant; that he refused to accept the money tendered to him by the plaintiff, in *February or March, 1814*, and to execute any conveyance.

The defendant also stated, that, in 1811 or 1812, the plaintiff often declared his inability to pay, and disclaimed all right to the premises, and relied wholly on the liberality of the defendant to permit him to occupy the premises un-

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til the defendant could sell them. That in the spring of 1812, the defendant required the plaintiff to quit the premises; and the plaintiff then agreed that, if he might be allowed to occupy the premises for one year, he would clear and fence five acres of the land, to which the defendant assented. But the defendant denied that it entered into the consideration of this agreement that the defendant should not sue for the purchase money; that the defendant had brought an action of ejectment for the premises, and had recovered judgment; that the defendant had since frequently referred purchasers to the plaintiff to show them the premises, and he had done so. That on the 1st of October, 1813, *Samuel Hills* offered to purchase the premises, and the plaintiff acquiesced in the sale, and declared that he should abandon the premises whether *Hills* purchased or not. That on the 2d of October, 1813, the defendant contracted with *Hills* for the sale of the premises for 700 dollars; and he paid above 500 dollars of the purchase money.

The facts alleged in the answer were proved by the defendant's witnesses.

The plaintiff proved that the farm was worth more than 20 dollars per acre, and that the improvements on it were worth about 300 dollars, the annual value of which was about 40 dollars.

*Gold*, for the plaintiff.

*J. Lynch*, for the defendant.

The points and authorities are so fully discussed in the judgment delivered by the court, that it is unnecessary to state the arguments of the counsel.

THE CHANCELLOR. I have considered this case with great attention, and I cannot discover any just principle

arising out of the facts that will warrant a decree for a specific performance.

The bill is founded on an agreement of the 28th of March, 1810, signed by the defendant only, and by which he agreed to sell to the plaintiff the land in question, "upon the following conditions being performed at the times stipulated, to wit, that the plaintiff should pay the defendant 250 dollars within one year; one third of the remainder in one year thereafter; one third in the next year; and the balance in the year following, with interest, annually, upon all sums unpaid from the date; and upon his complying with the above payments, with the interest, at the respective times for that purpose above mentioned, the defendant agreed to give a deed; but if he should fail in them, or either of them, the agreement to be void." Under this agreement, the plaintiff entered into possession, and made improvements, but he made no payments; and in October, 1813, (and which was above two years and a half after the first default,) the defendant, considering the agreement as void or abandoned, sold the land to another person, and, in February, 1814, the plaintiff filed his bill for a specific performance.

I need not stay to examine how far the objection of a want of mutuality is applicable to this contract, since the decision can be placed with more satisfaction upon the intrinsic merits of the case. But the point being stated by the counsel, I am unwilling to pass it by, without observing that it has been ruled in several cases, (*Armiger v. Clarke, Bunc. 111. Bromley v. Jefferies, 2 Vern. 415.*) that a bill for a specific performance will not be sustained, if the remedy be not mutual, or where one party only is bound by the agreement. This doctrine received a very clear illustration, and an explicit sanction, in a late decision by Lord Redesdale. (*Lawrenson v. Buller, 1 Schoale & Lefroy, 13.*) Though there are other cases in which an agreement has not been deemed within the statute of frauds, and a specific performance has been decreed, when the contract was

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signed only by the party sought to be charged, (*Seton v. Slade*, 7 *Vesey*, 265. *Fowle v. Freeman*, 9 *Ves.* 351,) yet the contrary opinion appears, from the most recent decisions, to be now prevailing. (*Champion v. Plummer*, 5 *Esp. N. P.* 240. *Huddleston v. Briscoe*, 11 *Vesey*, 592.)

There was an express stipulation in this contract, that if *the plaintiff failed in either of his payments, the agreement was to be void*. The first question that naturally presents itself is, whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment, in 1811. Lord *Thurlow* is said to have intimated, in *Gregson v. Riddle*, (cited in 7 *Ves.* 268,) that time could not be made of the essence of the contract even by a positive stipulation of the parties, but there was no decision on that point; and in other and later cases, (*Lloyd v. Collett*, 4 *Bro.* 469. 4 *Ves.* 589. n. *Seton v. Slade*, 7 *Ves.* 265,) it has been admitted, that the parties may make the time of the essence of the agreement, so that if there be a default at the day without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. The case is not analogous to that of a mortgage, where the only object of the security is the payment of the money, and not the transfer of the estate; and it seems to be conducive to the preservation of good faith, and the rights of parties, that if a contract of sale is expressly declared to be vacated on non-performance by a given day, that the courts should not interfere, as of course, to annul such a provision. The opinion of Lord *Loughborough*, in *Lloyd v. Collett*, contains a strong and decisive argument upon this point. "There is nothing," he observes, "of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound, and when

not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is so essential that, in no case in which the day has been by any means suffered to elapse, the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, &c., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, they shall be at liberty to rescind it. In most of the cases there have been steps taken." "I want a case," he says, "to prove that where nothing has been done by the parties, this court will hold, in a contract of buying and selling, a rule that the time is not essential part of the contract. Here no step had been taken, from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity." It would be impossible for me to add to the perspicuity and energy of this reasoning; and the Lord Chancellor, in that case, held, that as the vendor had omitted to complete a purchase for six months, being all that time in default, he was considered as having abandoned the contract; and he said there was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed.

It may, then, be laid down as an acknowledged rule in courts of equity, (and so the rule is considered in the elementary treatises on this subject,) (*Newland on Contracts*, 242. *Sug. L. of Vend.* 3d Lond. edit. 268.,) that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient jus-

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tification or excuse for his delay ; and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule appears to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail, (and of which the facts in the present case furnish an example,) that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity, to help those who show no equitable title to relief.

It may be useful, however, before we come to apply the rules of the court to the facts in this case, to look more particularly into the cases on the subject of relieving parties from delays in performance of contracts for the sale of land.

It was formerly supposed that the time fixed on for the completion of the contract was quite immaterial ; and there are some cases which have given countenance to this idea.

The case of *Vernon v. Stephens*, (2 P. Wms. 66.,) was a bill brought by a vendee for a specific performance after repeated defaults ; but in that case different payments had been made and accepted, and further time had been given after each default, by agreement in writing ; and the final default, after the last agreement, arose from the death of the original vendor, and a neglect for some time to take out letters of administration, so that the last default was reasonably accounted for ; and the case, therefore, proves nothing in favour of a party in default, without excuse, and without a waiver from the opposite party. The case of *Gibson v. Patterson*, (1 Atk. 12.,) in which Lord Hardwicke was supposed to have held, that non-performance at the time was

very immaterial, is proved to be most inaccurately reported, and that Lord *Hardwicke* made no such decision in that case, and the facts admitted of no such deduction. (4 *Ves.* 689, 690. n. 4 *Bro.* 497. 13 *Ves.* 228, 9.) And, indeed, in another case, (1 *Ves.* 450.,) Lord *Hardwicke* lays down the true rule on this subject, when he says, that it is the business of this court to relieve against lapse of time in the performance of an agreement, and *especially where the non-performance has not arisen by default of the party seeking to have a specific performance*. So it was also held, in the case of *Hayes v. Caryll*, as early as 1702, (5 *Viner*, 538. pl. 18.,) that where one person has trifled, or shown a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favour, especially if circumstances are altered.

I do not perceive, therefore, that in the more ancient cases there is real ground for the opinion that the time stipulated for the performance of a contract is of no moment in this court, and I am at a loss to conceive how such an extravagant proposition should ever have gained currency. It is certainly, and very justly, exploded in the modern decisions.

In *Pincke v. Curtis*, (4 *Bro.* 329.,) the suit was by the vendor for a specific performance, and the plaintiff had failed, for near a month after the specified day, to complete his title; but it appeared that the delay arose because the vendee was apprized of this cause of the delay, and acquiesced in it, and was willing to go on with the purchase, and a performance was consequently decreed. The case is not well reported; (see the note to *Sugden's Law of Vendors*, p. 278.;) but these were the true grounds of the decree, and the Chancellor said, that if the vendee had called for the deposit at the end of the time limited for completing the purchase, and had insisted not to go on with the purchase, the court would not have compelled him. The

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case of *Fordyce v. Ford*, (4 Bro. 494.) is to the same effect. There was a delay short of two months beyond the stipulated time; but when the abstract of the title was delivered to the vendee, he made no objection, but acquiesced; and if he had not, said Lord *Atchanley*, I should not have decreed a performance; and the rule now is, that if either party has been guilty of gross negligence, the court will not lend its aid to complete the contract; and he hoped, he said, that it would not be understood, from that decision, that a man is to enter into a contract, and then to think that he has his own time to perform it.

These were cases of delay on the part of the vendor; but the rule applies equally to both parties, and the purchaser who neglects his part of the engagement, will be left to his remedy at law, (if he has any,) though he may have paid part of the purchase money. He cannot be suffered to lie by and speculate on the rise of the estate. The cases of *Spurrier v. Hancock*, and of *Harrington v. Wheeler*, (4 Ves. 667. 688.,) were on bills filed by the purchaser for a specific performance; and, in the latter case, he had paid part of the purchase money; but the bill, in each case, was dismissed, on account of his *laches*, and trifling and unreasonable delay.

The observation of the Master of the Rolls, in *Mitward v. Thanet*, (5 Ves. 720. n.,) is very emphatical on the subject before us. He observed, that Lord *Kenyon* was the first who set himself against the idea that had prevailed, that when an agreement was entered into, either party might come at any time; and that it was then perfectly known that a party cannot call upon a court of equity for a specific performance, unless he had shown himself ready, desirous, prompt, and eager. *Guest v. Hornfray* (5 Ves. 818.) is another strong case on the point. Specific performance was there refused on account of the *laches* of the plaintiff, who was the vendor. Here the purchaser had been put into possession when the contract was made, but

the question was, as the court said, whether the plaintiff had done enough to show he took all the pains he could to be ready to carry the agreement into effect; and as it did not appear that he had done all he ought to have done, and though the delay was but three months, and the plaintiff had met with an unwilling purchaser, who meant to get rid of the contract if he could, the bill was dismissed. If, on the other hand, the circumstances of the case, and the conduct of the opposite party, will afford ground for a just inference that he has acquiesced in the delay, and waived the default, the non-performance at the stipulated time will be overlooked, and will be deemed to have been waived by the other party. The cases of *Seton v. Slade*, (7 *Ves.* 265,) of *Smith v. Burnam*, (2 *Anst.* 527,) and of *Paine v. Meller*, (6 *Ves.* 349,) as well as many others which might be cited, turn upon this distinction. From the review which I have taken of the cases, the general principle appears to be perfectly established, that time is a circumstance of decisive importance, in these contracts, but it may be waived by the conduct of the party; that it is inadmissible to the plaintiff, calling for a specific performance, to show that he has used due diligence, or, if not, that his negligence arose from some just cause, or has been acquiesced in; that it is not necessary for the party resisting the performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the plaintiff, but considered it as releasing him.

These principles appear to me to be founded in natural justice, and to be equally conducive to public convenience, and to the maintenance of public morals.

I shall cite only one more case, that of *Alley v. Deschamps*, (13 *Ves.* 224,) which was a late decision by Lord Erskine, and which, in all the circumstances of the case, is very analogous to the one now before me. It was a bill in behalf of a purchaser for a specific performance; he

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was to pay by instalments, and was put into possession upon the execution of the agreement. He, afterwards, became embarrassed and unable to comply with the terms, though he had paid 100*l.* in part satisfaction of the contract. The bill was filed before the last instalment was due. The defendant, in his answer, said, that the contract was considered by him as relinquished, and that the plaintiff was suffered to continue in possession as tenant. The Lord Chancellor said, he should take it that the agreement was not abandoned, and that the plaintiff did not, by his own act, consent to rescind it; but, he said, that under the circumstances of the case, there was not a colour for decreeing a specific performance; and that his judgment proceeded upon a plain principle, that a bill for specific performance would not be endured under such circumstances; that it would be dangerous to permit parties to lie by, with a view to see whether the contract would prove a gaining or losing bargain, and, according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance; that here nothing had been done except the one small payment towards performance when the purchaser became bankrupt, nor afterwards, until the premises, by a subsequent event, proved to be much more valuable than they were at the time the contract took place. The bill was dismissed, with costs.

It is impossible not to be struck with the close analogy between that and the case now under consideration. Here the purchaser has paid nothing, but suffered defaults to accumulate, year after year, as if he had forgotten that he was under any obligation to pay; and if the land had not risen in value within the last two or three years, so as to render the purchases an object of speculation, there is no reason to believe that the plaintiff would ever have attempted to raise the money out of the benevolence of his friends. I think that, within the reason and spirit of all the cases, here

was a gross negligence on the part of the plaintiff, that takes away his claim to assistance.

The circumstances attending the new agreement between the parties, of the 14th of *March*, 1812, prove, conclusively, that the original contract was expressly abandoned. This agreement, by which the plaintiff contracted with the defendant to clear off and fence five acres within one year, does not, of itself, import that the original agreement was, or was not, abandoned ; and parol evidence is admissible to explain that fact, which is collateral to the operation of the instrument. Such evidence would not vary or qualify the effect of it ; it would only go to repel any presumption, or rebut any equity, which might be attempted to be induced from the instrument itself. But there is another ground on which the parol evidence to which I allude is competent. This agreement is stated to have been given in consideration of one dollar, *and for various other considerations* ; and it was admitted by Lord *Hardwicke*, in the case of *Peacock v. Monk*, (1 *Ves.* 127.) that if a deed, after mentioning any particular consideration, adds, *and for other considerations*, you may enter into proof of these other considerations ; and the same doctrine was alluded to in the case of *Maugley v. Hauer*, (7 *Johns. Rep.* 341.) There is no repugnancy, in such a case, between the proof and the deed. It is then proved, in this case, by two witnesses, (*James Lynch* and *Mansel Falcon*,) that when the agreement was made, the defendant, by his agent, stated to the plaintiff, that as he had failed in his contract, the plaintiff must sell the land to some other person ; that the plaintiff admitted he could not pay for the land, and that if the defendant would permit him to remain on the land for one year, he would then abandon the same, and give up the possession ; and, as a consideration for continuing on the land for the year, he would clear and fence five acres ; and that the writing was given for that purpose. In addition to this testimony, we have that of *Josiah Hills*, who states, that in

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September, 1813, he went with Samuel Hills to the plaintiff, and the plaintiff then told him that he could not pay for the land, nor complete his purchase, and that he expected to leave the land in the course of the then next winter, and that he was willing to give up the possession, and even offered to sell his claim under the contract for 10 dollars, though without warranting a deed. This was the person who, a few days after, purchased the land of the defendant, and paid most of the consideration money. No doubt this purchase was greatly induced by that conversation, and the plaintiff, after such continued and gross neglect in not complying with his original contract, and after such express abandonment of the purchase, and after such admissions to a subsequent purchaser, comes into this court, without any colour of equity, to ask for a specific performance. I shall, accordingly, dissolve the injunction, and dismiss the bill, with costs.

Decree accordingly.

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SANFORD  
v.  
BISSELL.

April 1st.

## SANFORD against BISSELL AND OTHERS.

If exceptions are taken to an answer, and the defendant submits to the exceptions by putting in a further answer, the plaintiff, if he thinks the second answer not sufficient, should, within a reasonable time, say three weeks, obtain an order to refer the answer to the master for insufficiency. And the plaintiff ought, either in the order of reference, or by notice to the defendant, to specify to which of the exceptions the second answer is still imperfect.

Where exceptions to an answer were taken in November, and the defendant put in a second answer in December, and the plaintiff, in March following, obtained a rule of reference to the master, without any notice to the defendant, the plaintiff was deemed to have acquiesced in the second answer, and the order of reference was set aside :

And though the second answer was not accompanied with an offer to pay the costs of the exceptions, which the defendant, in such case, is regularly bound to pay ; yet, as the plaintiff made no objection on that ground, nor called on the defendant for the costs, he was precluded from making that objection afterwards.

*VAN VECHTE N*, for the defendants, moved to set aside the order of reference entered in this cause, on an affidavit, stating, that on the 22d of October last, he filed an answer in the cause ; that exceptions to the answer were filed on the 12th of November ; that an answer to the exceptions, or further answer, was filed on the 8th of December, and notice thereof given ; that an order was entered on the 17th of March last, referring the bill, answers, and exceptions, to a master ; that no notice had been given of any step taken by the plaintiff since filing the exceptions, until a summons was given by the master, under the above order of reference.

He objected to the reference, *first*, as being out of time ; and, *secondly*, as being too general, and not stating which of the exceptions were insufficiently answered. He cited *Parker's Analysis of Ch. Practice*, 16. 1 *Turner's Pract.*

1815. *Int. 22. 1 Harr. Prac.* 311., and the 12th and 57th rules  
of June, 1806.

SAYFORD  
v.  
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*I. Hamilton, contra.*

**THE CHANCELLOR.** This is a case in which the defendants submitted to answer the exceptions by putting in a further answer; and if the plaintiff had conceived the second answer insufficient, he should, within a reasonable time, have obtained an order to refer it to a master for insufficiency. The case was not within the letter, but it was within the spirit, of the 12th rule of June, 1806; and three weeks would have been a reasonable time. A delay of three months, before a reference is applied for, or any objection made, is certainly out of time; and the party ought to be concluded; or to be deemed to have acquiesced in the further answer.

There is, also, weight in the objection, that the plaintiff has not specified, either in the order of reference, or by notice, to which of the exceptions the second answer is still imperfect. By referring both answers, and the exceptions generally, the other party must be utterly at a loss in what respect he has failed in his submission. The practice is not to take exceptions to the second answer; but to state, generally, which of the exceptions is not duly answered, is giving to the defendant reasonable information, without any violation of this rule of practice.

The second answer does not appear to have been accompanied with an offer to pay the costs of the exceptions; and if a defendant submits to answer the exceptions, he must pay costs. But no objection was made to the answer on this ground. The plaintiff consented to receive it by including it in the order of reference, and, if he meant to rely on the want of his costs, he should have called on the other party for them.

Motion granted.

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MOORE  
v.  
CABLE.

## MOORE against CABLE.

April 4th.

Possession by the mortgagee, for a period short of twenty years, will not bar the equity of redemption; the possession must be an actual, quiet, and uninterrupted possession, for twenty years, or a period sufficient to toll the right of entry at law.

A mortgagee or assignee, in possession, is not to be allowed for his improvements in clearing wild land, but only for necessary reparations, &c.; and must account for the rents and profits received by him, except such as have arisen exclusively from his own improvements.

BILL for the redemption of a mortgage. On the 26th of February, 1789, *William Brown*, being seised of the premises, lot No. 54., in *Smith & Graves's* patent, conveyed the same to *Joseph Roe*, who, for securing the purchase money, reconveyed them to *Brown*, by mortgage, dated the 27th of February, 1789, and conditioned for the payment of 40*l.* with interest, on the 1st of May, 1790. On the 28th of October, 1794, the mortgage was assigned to the defendant, for the consideration of 30*l.*, by the brother of *Brown*, as his attorney. The heirs of *Roe*, on the 1st of August, 1807, sold and conveyed the premises to the plaintiff, with covenants and warranty.

It appeared that the defendant entered into actual possession of the premises, by his tenants, in 1800, but had, previous to that time, exercised acts of ownership. He continued in possession until 1808, when he, in conjunction with one *Corbin*, took a lease from the heirs of *Roe*. *Corbin*, being in as tenant of the defendant, consented to let in the plaintiff with him; and the defendant brought an action of ejectment, and recovered judgment in 1813, and has since continued in possession, and made improvements, by clearing part of the land, and has received the rents and profits. The plaintiff did not know, until the trial of the

1815. ejection, in 1813, that the defendant held under a mortgage, and had, in 1807, offered to purchase his interest.

MOORE

CABLE.

S. A. Foot, for the plaintiff. He cited 5 *Bac. Abr.* tit. *Mortgage*, (E.) 2 *Cruise's Dig.* 140. s. 18. 2 *Salk.* 450.

Henry, for the defendant, contended, that the possession was to be presumed to be in the mortgagee, after the default in May, 1790. (9 *Johns. Rep.* 604—614.) The remedy in law, after such a length of possession by the mortgagee, would be gone, and so the equity of redemption was lost. (1 *Powell on Mortg.* 386. 3 *P. Wms.* 287.)

THE CHANCELLOR. Two questions are presented by this case.

1. Is the plaintiff entitled to redeem ?
2. Is the defendant entitled to an allowance for the improvements he made while in possession, by clearing a part ?  
1. It appears that *Cable*, the assignee of the mortgagee, took actual possession of the premises in the year 1800, though he had exercised acts of ownership previous to that time. It does not appear in what those acts of ownership consisted, nor how long, previous to the time of the actual entry, those acts had taken place. It was in the power of the defendant, as the fact was within his own knowledge, to have afforded clear and decisive testimony on this point, and as he has omitted to do it, he is not entitled to the benefit of any presumed possession prior to the year 1800. His actual possession, in any view of the case, falls far short of the length of time which has been adopted by the courts of equity as sufficient to bar the right of redemption. They have taken the period of twenty years of quiet and uninterrupted possession by the mortgagee, as being the period that, by the statute of limitations, tolls the entry at law ; and I believe there is no case to be found in which a less period has been held a bar to the equity of redemption. A length of

time, said the Lord Chancellor, in *Cook v. Arnham*, (3 P. Wms. 283.,) which will not bar an ejectment, cannot bar a bill in equity. And, in another case, (*Anon.* 3 Atk. 313.,) Lord Hardwicke held the period of fifteen years (which is precisely the time here) no bar to the redemption, and that the assignee of the equity (as is also the case here) had the same right to redeem as the mortgagor himself. Nor will a mere constructive possession, for 20 years, be sufficient. The courts require an actual possession by the mortgagee during the period that is to form the equitable bar; for, as they adopt the rule by analogy to the statute of limitations, it requires the same actual and continued possession to form a bar in equity that is requisite to form a bar at law. The idea suggested by the counsel for the defendant, that as the mortgaged premises were, probably, wild, uncleared lands, possession is to be deemed to have followed the right, and to have been in the mortgagee after default of payment, is not applicable to this case. That fiction was adopted by the courts to preserve the lands of the true owner, while in their uncultivated state, from intrusion and trespass; and it would be a perversion of the rule, to make it operate by way of extinguishment of a right. Nothing short of actual possession for twenty years will, at law, toll the entry of the true owner; and the equity of redemption, which, in this court, is the same as the fee at law, ought to be equally protected.

The plaintiff, therefore, as assignee of the equity of redemption, is entitled to redeem.

2. The next question is, whether the defendant, standing in the place of the mortgagee, can be allowed for what the case states as improvements in clearing part of the land. Such an allowance appears to me to be unprecedented in the books, and it cannot be admitted consistently with established principles. The defendant was, in this case, a volunteer. Instead of calling upon the debtor, or foreclosing the mortgage, he elected to enter upon uncultivated

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lands, and to exercise acts of ownership by clearing a part. To make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make. The *English* courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt. In *French v. Baron*, (2 *Atk.* 120,) the Chancellor would not allow the mortgagee any thing more than his principal and interest, though there was a private agreement between the mortgagor and mortgagee, for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate. The same thing was repeated in the case of *Godfrey v. Watson*, (3 *Atk.* 517,) and Lord *Hardwicke* there said, that a mortgagee in possession was not obliged to lay out money any further than to keep the estate in necessary repair; but if the mortgagee had expended money in supporting the title of the mortgagor when it had been impeached, he would allow it. The same doctrine was maintained in the case of *Bonethon v. Hockmore*, (1 *Vern.* 316,) in which it was declared, that no allowance was to be made to a mortgagee or trustee for their care and pains in managing the estate.

I shall, accordingly, direct a master to compute the principal and interest due on the mortgage, down to the 1st of January last, and that, in taking the account, he charge the defendant with the net amount of the rents and profits received, except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary reparations, if any, but not for improvements in clearing part of the land; and

that he report with all convenient speed ; all the other questions are in the mean time reserved.

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Decree accordingly.

—————\*

April 8th.

To entitle a party to sustain a bill for a *divorce*, under the statute, (sess. 36. ch. 102. 2. *N. R. L.* 197.) he must be an actual and *bona fide* inhabitant of the state at the time of the adultery committed, and at the time of exhibiting the bill.

Where the plaintiff, a native of *Scotland*, married his wife in *New-York*, in 1780, and left her in 1784, and went to the *West Indies*, and continually resided abroad, excepting only a short visit to *New-York*, in 1792, until the time of filing his bill for a *divorce*, in 1813, a period of 23 years; it was held that he was not an inhabitant of the state, within the words or intent of the act.

Though an absence of five years, of one of the married parties, may exempt the other, who marries again, from the *penal consequences* of *bigamy*, under the provisions of the act, (1 *N. R. L.* 113.) yet the second marriage is null and void; for nothing but the death of one of the parties, or the judicial decree of a competent court, can dissolve the marriage tie.

THIS was a bill for a *divorce*, *a vinculo matrimonii*, filed by the husband against his wife, January 15. 1813, on the ground of adultery. The plaintiff stated, that in the year 1780, then being a resident in *New-York*, he married the defendant, then *Jane Lowndes*, an inhabitant of *New-York*, with whom he cohabited until the year 1784; and during their cohabitation had three children by her, two of whom are still living. That the plaintiff, being a mariner, in June, 1784, sailed from *New-York* for *Jamaica*, in the *West Indies*, and, from various causes and accidents, did not return to *New York* until 1792.

The bill charged that the defendant, in 1791, committed adultery with *Philip Parisien*, in *New-York*, with whom

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she pretended to have intermarried about that time, and still lived in adultery with him; and during such illicit intercourse with the said *Parisien*, has had six children by him, &c.

The *answer* of the defendant, filed May 13th, 1813, stated, that the defendant was married in the city of *New-York*, in 1780; that the plaintiff cohabited with her about three years, during which time she had two children by him, when he left her with child by him, which child was born a few weeks after his departure. That the plaintiff remained abroad eight years, settled in the island of *Jamaica*, acquired wealth, and lived there in a state of adultery, and had not, since his departure from *New-York*, in 1784, contributed in the slightest degree, to the support of the defendant, nor for the maintenance and education of her children. That she had, though struggling with great difficulties, by unwearyed industry, maintained and brought up her children by him, one of whom died at the age of nine years. That the plaintiff took away her eldest son, at the age of 14 years. Concluding that the plaintiff had abandoned her for ever, or was dead, as was generally believed, she married *Parisien*, in 1792, with whom she had since lived in the marriage state, and by whom she had several children. That the plaintiff is a native and subject of *Great Britain*, having his residence in the island of *Jamaica*, where he has a house of trade, plantations, and slaves.

The cause was heard on the bill and answer, and an order of reference made, the 4th of *September*, 1813, to a master, to examine and report the truth of the facts set forth in the bill and answer.

On the 17th *January*, 1814, the master made a report of the evidence. The material facts proved are stated in the judgment of the court.

On the 12th of *October*, 1814, the cause came on, and was heard, *ex parte*, and a decree entered for the plaintiff; but, on petition of the defendant, an order was made, the

31st of October, for a rehearing. And the cause, accordingly, was brought on for a rehearing January 25th, 1815.

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*Burr*, for the plaintiff.

*Van Vechten*, contra.

**THE CHANCELLOR.** The bill was filed the 15th of January, 1813, and the answer, among other things, states that the plaintiff "has his residence in the island of *Jamaica*, where he has a house of commerce, with other possessions, and slaves." Upon this bill and answer, a reference, upon the motion of the plaintiff, was made to a master, to inquire into the truth of the facts set forth in the bill and answer, and all questions arising thereon were reserved. Before, then, the question of adultery can be discussed, we must determine, from the facts stated in the report, whether the plaintiff had a residence within this state at the commencement of the suit, so as to entitle him to sustain the action. The statute concerning divorces is very explicit on this subject, that the injured party must be "*an actual resident* in this state at the time of the adultery being committed, and at the time of exhibiting the bill."

From the proof taken before the master, it appears, that the plaintiff is a native of *Scotland*; that he came to *New-York* during the revolutionary war, and married the defendant in 1780; that, in *June*, 1784, he went to the *West-Indies*, and did not return to *New-York* until *June*, 1792; that, in the mean time, he was not heard of in his wife's family here, and it was generally supposed he was dead; that he soon after returned to the *West-Indies*, though how soon does not certainly appear; that, about 1797, a son of his, by the defendant, went to live with him in the *West-Indies*; that, as to his second or last return to this state, it must have been very shortly before the filing of the bill, for one of the witnesses says he saw him, for the first time, about two months

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before the 13th of *October*, 1813, but that he understood he had been here as long as nine months. Another witness saw him since his last return only, about three or four months before *November*, 1813; and a third witness says, that she had not heard of the plaintiff since his first return, until within about a year from *November*, 1813. These witnesses are all that speak on the subject of his last return to *New-York*, and as they were acquaintances, or connexions, of the parties, they were the persons who would, probably, acquire the earliest knowledge of his return.

Considering that the plaintiff had continually resided abroad from *June*, 1784, down to near, or about, the time of the filing of the bill, (a period of above 28 years,) with the exception only of the short visit in 1792, I think there is a want of proof of residence in this state within the purview of the statute. The fact of non-residence was put in issue by the answer, and it was the business of the plaintiff to have furnished some direct and positive proof of the time of his return, and of the establishment of his residence here. The fact was within his knowledge, and the omission to furnish the proof ought to turn every presumption against him. His domicil was established abroad, and it is not changed by an arrival here for some temporary purpose, or on a transient visit. The party suing for a divorce must have become an inhabitant, and taken up his residence here with a *bona fide* and permanent intent. There must be the *animus manendi*, or a train of conduct and acts, showing an intended settlement here, before he can bring himself within the policy, as well as the language of the statute.

The circumstances of this case are rather extraordinary. The plaintiff, after living with his wife for several years, and having children by her, abandons her while *enseint*, and goes abroad, and remains for eight years, without giving her either assistance or information. She presumes him dead, and marries again. He returns and discovers it, and, with apparent acquiescence, departs again for foreign parts, and continues

abroad for 20 years ; and he now, at this advanced period of his life, returns and prosecutes his wife for adultery, arising from the second marriage, after she has lived with her second or assumed husband, with his knowledge and apparent acquiescence, for so many years, and reared up a family of children. The case, on his part, presents a cruel aspect, and I feel no reluctance in being obliged to dismiss the bill ; yet no conclusion must be drawn from this in favour of the validity of the second marriage. Though an absence for five years, of one of the married parties, will exempt the other, who marries again, from the penal consequences of bigamy, yet the statute provision goes no further ; and, beyond all doubt, the second marriage is null and void ; no length of absence, and nothing short of death, or the judicial decree of some court, confessedly competent to the case, can dissolve the marriage tie. This is a principle, I may venture to say, that pervades the laws of all the *Christian* nations of Europe. (1 Black. Com. 440. 4 Black. Com. 163, 164. Pothier, *Traite du Contrat de Marriage*, n. 437. 462—497. Ersk. Inst. vol. 1. p. 109. 113. Barrington on the Statutes, 401. Voet's Com. ad Pand. lib. 23. tit. 2. *de ritu Nuptiarum*, s. 99.)

There were other objections suggested to this bill, arising from the conduct of the plaintiff, and the lapse of time, which I deem very important, but which I need not now discuss, as I find sufficient reason for dismissing this bill simply on the ground of a want of domicil here at the commencement of the suit.

Bill dismissed, with costs.

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April 14th.

## PARKIST against ALEXANDER AND OTHERS.

An agent or trustee, undertaking a special business, cannot, on the subject of that trust, act for his own benefit to the injury of his principal.

If an agent undertakes to judge whether he may not innocently depart from the instructions of his principal, he does it at his peril.

The registry of a mortgage is, of itself, notice, in law, to all subsequent purchasers.

And, *it seems*, that the registry of a mere equitable mortgage or encumbrance, is notice to the subsequent purchaser of the legal estate, so as to entitle such mortgage to a preference.

THE bill stated that, in 1804, *William Tucker* made a verbal agreement with *William Alexander*, now deceased, in his lifetime, for a lease to *Tucker*, in fee, for lot 4., in the village of *Little Falls*, subject to the annual rent of three pounds. That *Alexander* then acted as a sub-agent, to make verbal agreements, under *Barent Bleecker*, who was the attorney in fact of *Ellis*, the owner of the property, and authorized to make and execute leases in his name. That, a few months after that agreement, the plaintiff purchased *Tucker's* right, for three dollars, and took possession of the premises, of which *Alexander* had notice. That, in 1805, the plaintiff built a house, and made valuable improvements on the lot, and in 1806, built a barn thereon, and continued to occupy the premises, having expended above 600 dollars in improvements, until the 6th *May*, 1808, when he sold the premises, &c., to *Alexander M'Knight*, for 550 dollars, and gave him a quit-claim deed; and to secure the payment of the purchase money, took his bond, and a mortgage on the lot, which mortgage was duly registered the 27th of *December*, 1807. That, at the time of sale, it was explained to *M'Knight*, that the plaintiff held the lot under a *parol* agreement only for a lease; but that a lease should be procured from *Barent Bleecker* to confirm his title.

That in 1810, the plaintiff requested *William Alexander* to obtain a lease of *Bleecker*, pursuant to the parol agreement, and *Alexander*, accordingly, procured a lease from *Bleecker* to the plaintiff, in fee; but soon after *Alexander* discovered that the lease was incorrect in its description of the bounds of the premises, and advised the plaintiff to have the lease returned and corrected. That the plaintiff accordingly authorized *Alexander* to surrender the lease, and procure a new one to *M'Knight*, with the intent thereby to give effect to the mortgage which *M'Knight* had made to the plaintiff, and *Alexander* engaged so to do, well knowing all the facts relative to the lease.

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That, at various times, in 1810 and 1811, the plaintiff inquired of *Alexander*, whether he had obtained the lease to *M'Knight*, and he answered that he had neglected to do so. That, in April, 1811, a default having been made in the payment of *M'Knight's* bond, the plaintiff caused the mortgaged premises to be advertised for sale, under the power for that purpose contained in the mortgage. That, on the 10th of September, 1811, about a month before the day of sale, the plaintiff called on *Alexander*, and offered to take the incorrect lease himself, and get it exchanged for another, as he wished to obtain the new lease to *M'Knight* before the day of sale. That *Alexander* then confessed that he had got the new lease in his own name; and that he had done it for the purpose of securing a debt due to himself from *M'Knight*. That the premises were sold on the 10th of October, 1811, for 125 dollars, to *Thomas Smith*, the agent of the plaintiff, who executed a release to the plaintiff, on the 14th of January, 1812.

The bill charged that *Alexander*, in 1811, in violation of his engagement and trust, falsely represented to *Bleecker*, that the plaintiff requested to surrender the old lease, and that a new lease should be given to him, *Alexander*, which was done accordingly. That *M'Knight* is now, and has been for five years past, poor, so that the bond is of little or

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no value, and the only security the plaintiff relies on is the mortgage. That there was a *collusion* between *M-Knight* and *Alexander* to defeat the plaintiff's mortgage. That *Alexander* died intestate, in *February*, 1813, leaving a widow, who was administratrix, and several children, his heirs at law, who are defendants. The plaintiff prayed that the lease might be assigned to him, or that the defendants should pay off the mortgage and the costs.

The *plea* and *answer* of the widow and children of *Alexander* stated, that *M-Knight* showed *Alexander* the deed from the plaintiff, and, in consideration of 700 dollars, (paid partly in cash, and part in satisfaction of an old debt due from *M-Knight* to *Alexander*,) sold and conveyed the premises to *Alexander*, by a release, dated the 5th of *January*, 1810. That the purchase was made by *Alexander* in confidence that *M-Knight* had a right to sell, and that, before the payment of the money, *Alexander* had no notice of the mortgage, or of any right of the plaintiff to the lot. That the second lease of the lot, dated *January* 1st, 1810, was obtained by *Alexander* with the consent of *M-Knight*, and without any notice of the mortgage or claim of the plaintiff. That *Alexander* purchased the lot after he had been directed to procure the lease; and that he was first informed of the mortgage after the purchase and payment to *M-Knight*, and after the plaintiff had advertised the sale under the mortgage.

*Alexander M-Knight*, who was also made a defendant, admitted the purchase of the lot, and the bond and mortgage as stated in the bill, and that the mortgage is unsatisfied. He stated that, without any intention to defraud the plaintiff, he sold the lot to *Alexander* about the 1st of *January*, 1810, for 700 dollars, part of which was paid in cash, and the residue was to satisfy a debt due *Alexander*, but he made no disclosure of the mortgage.

It was proved by several witnesses, that the plaintiff requested *Alexander* to take back the first lease, and procure a new one, in the name of *M-Knight*; and that *Alexander*

promised to do so, and that the reason assigned for having the new lease in the name of *M-Knight* was to save expense. It did not appear that *Alexander* knew of the mortgage, until the advertisement for the sale of the premises under it.

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*Kirkland*, for the plaintiffs.

*Gold*, contra.

THE CHANCELLOR. The plaintiff is entitled to relief. The intestate was intrusted by him with the agency of procuring a lease in fee of the premises, in the name of *Alexander M-Knight*, and he promised to perform the trust. Instead of doing this, he, afterwards, purchases the equitable title of *M-Knight*, and, with the consent of *M-Knight*, but without the knowledge or consent of the plaintiff, took the lease in his own name. In consequence of this, a mortgage from *M-Knight* to the plaintiff, and which was duly registered prior to the taking of the lease, and prior to the deed of *M-Knight*, is now attempted to be superseded, by setting up this subsequent legal title in the intestate. This, I think, cannot, and ought not to be permitted. An agent, or trustee, undertaking a special business for another, cannot, on the subject of that trust, act for his own benefit to the injury of his principal. This is a sound and fundamental rule of equitable policy. (*Hardwicke v. Vernon*, 4 *Ves.* 411., and see the case of *Green and others v. Winter*, \* \* *Ante*, p. 28—  
*44.* May, 1814, and the authorities there cited.) The consent of *M-Knight* alone was not sufficient to authorize this departure from the instructions, for they were given by the plaintiff himself, and accepted as coming from him; and if the agent undertakes to judge that he may innocently depart from them, for the sake of his own interest, and that the variation cannot be material, he does it at his peril. If it turns out that the departure will essentially affect the rights of the principal, the agent cannot, surely, establish any con-

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flicting interest of his own upon such departure from his instructions.

I shall consider this case, then, as if the lease had been taken in the name of *McKnight*, and then the question is, whether the subsequent purchase by the intestate, without notice of the registry of the plaintiff's mortgage, can defeat that mortgage? This point was settled in the case of *Johnson v. Stagg*, (2 Johns. Rep. 510.) The registry of a mortgage is, of itself, notice, in law, to all subsequent *purchasers*, as well as *mortgagors*; and they are bound, at their peril, to consult the registry. A contrary doctrine would shake the foundation of all mortgage security, and lead to every species of fraud. It is, clearly, not the doctrine of the statute, which declares, that "no mortgage, nor any deed, conveyance, or writing in the nature of a mortgage, shall defeat or prejudice the title or interest of any *bona fide* purchaser, &c., unless the same shall have been duly registered." If this paragraph does not mean that a mortgage, duly registered, shall be preferred to a subsequent *bona fide* deed without notice, it is senseless and idle, and worse than idle—it is delusive, and a snare to the unwary. No decisions of the *English* courts, upon the *English* registry acts, in which there is any variation in the language of the provision, could induce me to change my opinion on the construction of our statute. I had occasion, lately, in the cause of

\* *Ante*, p. 238. *Frost v. Beekman*,\* to express this same opinion; and with me the point is absolutely at rest.

In this case, and for the purpose of this decision, I consider what ought to be done as done, and, consequently, that *McKnight* had a legal estate to support his mortgage to the plaintiff. But if the intestate had acted as he did, without any instructions from the plaintiff, and so as to reduce the interest of *McKnight* to a mere equitable estate at the time that he gave the mortgage to the plaintiff, and at the time that he gave the deed to the intestate, I think the better opinion is, that the registry of such equitable mortgage, or

encumbrance, is notice to the subsequent purchaser of the legal estate. The statute I have cited, speaks of any "writing in the nature of a mortgage," and these words may reach to any agreement creating an equitable encumbrance. The design of the statute was, that every purchaser should look to the registry of mortgages, and see whether there was any mortgage, or any writing in the nature of a mortgage, previously executed by the grantor. Lord Hardwicke said, in *Hine v. Dodd*, (2 *Ak.* 275.) that the register act of 7 Anne, c. 20., was notice to all the world, but that the courts had broken in upon the statute in cases of fraud. And some of the latest and best writers on the subject (*Cruise's Digest*, vol. 4. 348. *Sug. L. of Vend.* 3d *Lond.* edit. 524—8.) admit, that the true construction of the register acts is to render the registry, even of an equitable encumbrance, notice to all persons, and that the purchaser ought to search, or be bound by the notice. But the decisions, on the subject of tacking one lien to another, as in the cases of *Bedford v. Bacchus*, and of *Wrightson v. Hudson*, (3 *Eq. Cas. Abr.* 615. pl. 12. 609. pl. 7.) are considered, in *England*, as having given a different construction to the registry acts. This doctrine of tacking has, however, been adjudged, and finally settled, with us, (*Grant v. U. S. Bank*, 1 *Caines' Cas. in Error*, 112.) not to apply between registered mortgages; and the force of these decisions is no longer to be regarded. The case of *Morecock v. Dickens*, (Amb. 678.) decided by Lord Camden, in 1768, is considered as the leading and decisive authority against the doctrine of constructive notice arising from the registry of a "writing in the nature of a mortgage;" and he seems to ground his opinion wholly upon the case of *Bedford v. Bacchus*, but he manifests, at the same time, a strong reluctance to be bound by such a doctrine. In that case it had been agreed, by deed between *Morecock* and *Wilson*, that a lease of lands to *Wilson* should stand as a security for 800*l.*, and this deed, containing the agreement, was duly registered

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under the stat. of 7 Anne. *Wilson*, afterwards, mortgaged the lands to *Dickens* for 800*l.*, and delivered him the lease ; but *Dickens*, at that time, had no notice of *Morecock's* deed. *Wilson* became bankrupt, and *Morecock* filed his bill to be paid the money in preference of the mortgage to *Dickens*. The question was, whether *Dickens*, who had got the legal interest, was to be affected with constructive notice arising from the registry of *Morecock's* deed ? and Lord *Camden* said, that he considered himself bound by the decision of *Bedford v. Bacchus* ; that a thousand neglects to search had been occasioned by that decision, and, therefore, he could not take upon him to alter it ; that if this was a new question he should have had his doubts, and that it was a serious question whether a court of equity should not say that, in all cases of registry, a subsequent purchaser ought to search, or be bound by the registry.

Mr. *Sugden* says, that this decision seems hardly reconcileable with the general principles of equity, and that it was founded on a mistaken application of the case of *Bedford v. Bacchus*. But when we consider that the principle of that prior decision is done away with us, and that except this of Lord *Camden*, and those relating to tacking encumbrances, we have no decisions on the point, and nothing but some extra-judicial *dicta*, (1 *Schoale & Lefroy*, 90. 157—160, 161.,) I think we are at liberty to give our registry act such a construction as will best accord with the obvious dictates of its policy. If the plaintiff's claim was, then, to be considered as resting upon a mere equitable mortgage, I should still be of opinion that the registry of that mortgage gave it a preference to the subsequent legal title of the intestate.

I shall, accordingly, give to the defendant, *Catharine M. Alexander*, as administratrix and guardian, &c. the election, either, within 30 days, to assign over to the plaintiff the lease taken in the name of the intestate, or to discharge the mortgage debt, with the costs of the foreclosure ; and, in default of

making such election, that the lease be assigned by her, as administratrix and guardian aforesaid; and that, in either case, she pay the costs of this suit.

The following decree was entered :

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"That *Catharine M. Alexander*, one of the above defendants, as administratrix of the goods, chattels, and credits of *William Alexander*, deceased, and guardian to the other defendants, excepting *Alexander McKnight*, within thirty days after being served with a copy of this decree, make her election, either to assign over to the plaintiff, and to his heirs, by an instrument valid in law, all the right, title and interest of the said *William Alexander*, at the time of his death, of, in, or to the lease mentioned in the pleadings in the above cause, bearing date on or about the first day of *January*, in the year of our Lord one thousand eight hundred and ten, and taken by the said *William Alexander*, deceased, in his own name, and given for town lot No. 4., in *First-street*, in the village of *Little-Falls*, and accompany the said assignment with actual delivery of the lease, or to pay to the plaintiff the principal and interest due on the bond and mortgage mentioned in the said pleadings, and executed by *Alexander McKnight*, one of the defendants, to the plaintiff, and bearing date the sixth day of *May*, in the year of our Lord one thousand eight hundred and eight, together with necessary costs and expenses of the plaintiff, accrued in advertising and selling the lot under a power contained in the said mortgage; and, in case the said *Catharine M. Alexander* shall, within that time, elect to discharge the mortgage debt and costs as aforesaid, and shall signify her election in writing, subscribed by her, or her solicitor, or counsel, and served on the plaintiff, his solicitor or counsel, or filed in the register's office, it is further ordered, that it then be referred to one of the masters of this court, residing in *Albany*, *Oneida*, or *Herkimer* counties, to ascertain and report, with all convenient speed, the amount of such principal and

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interest and expenses as aforesaid ; and that upon confirmation of such report, the same be paid : and if no such election be made within the time aforesaid, it is further ordered, adjudged, and decreed, that the said *Catharine M. Alexander*, immediately after the expiration of the said thirty days, assign and deliver the lease as aforesaid. And it is further ordered, adjudged, and decreed, that, in either case, the said *Catharine M. Alexander* pay to the plaintiff his costs of this suit, to be taxed."

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April 14th. A. C. F. & G. REIGAL against WOOD AND OTHERS.

Equity grants relief, not only against deeds, writings, and solemn assurances, but against judgments and decrees, obtained by fraud and imposition. Where an attorney revived, by *scire facias*, an old outstanding judgment, on which but a very small sum, if any thing, was due, and knowing that the land on which the judgment remained a *lien*, was in the possession of innocent and *bona fide* purchasers ; and afterwards made use of the judgment to compel the purchasers, who were ignorant of the proceedings under the *scire facias*, to pay and secure to him a debt he claimed against the person under whom they had purchased ; this court, on the ground of imposition and undue advantage taken by the attorney, ordered him to refund the money he had so obtained, and set aside the securities he had taken, with costs.

THE bill, which was for an injunction, stated, that on the 23d of January, 1801, the plaintiffs purchased of *John Smith*, 200 acres of land in lot No. 54., in the township of *Manlius*, for 1,900 dollars. That the land was then subject to a mortgage by *Smith* to *Michael Myers*, for 800 dollars, which the plaintiffs paid to *Myers*, who agreed that the mortgage might remain for their use, and to secure their title. The plaintiffs took possession of the land, which they divided equally between them. That, in June, 1810, the plaintiffs were informed that *Thaddeus M. Wood*, defendant, had

caused the land to be sold, at the sheriff's sale, under a judgment in the name of *Daniel Avery*, (defendant,) against *John Smith* and *Aaron Wood*, obtained 13 or 14 years ago, in the *Onondaga* court of common pleas, on a promissory note for sixty dollars, for goods sold by *Avery*, as trustee, to one *Dickhout*, an absconding debtor. That the defendants, *T. M. Wood* and *George Hall*, purchased the land at the sheriff's sale. That the plaintiffs applied to *Wood* on the subject, who, at first, agreed to accept 40 dollars on the judgment, and release the purchase, but afterwards demanded payment of another judgment against *John Smith*, in favour of *Peter Smith*, for 300 dollars, which *Wood* alone, or in conjunction with two of the defendants, *Isaac* and *John Delamater*, had before purchased of *Peter Smith*. That the plaintiffs, through ignorance, yielded to the terms demanded, and gave *Wood* their bonds and mortgages on the premises, for 308 dollars, payable in a short time, with interest. The sum being divided into four equal parts, for which four bonds were given, and *Wood* and *Hall* released their claim to the land to each of the plaintiffs separately. That, afterwards, on investigation, the plaintiffs found that *John Smith*, after the judgment against him, in favour of *Avery*, had paid the amount of the judgment to *John Rappelye*, the creditor who had instituted the proceedings against *Dickhout*, and had paid, in boards, the costs to *Wood*. That *Wood*, in order to overreach the purchase of the land by the plaintiffs, had caused the judgment to be revived by *scire facias*, without the knowledge or consent of *Avery* or *Rappelye*; and that *John Smith*, being insolvent, aged, and having removed out of the county, did not attend to the suit. That the judgment of *Peter Smith* was assigned as above mentioned, with an express agreement that the land of the plaintiffs should not be affected by it, and made solely for the purpose of securing and protecting another piece of land claimed by *Wood* and the *Delamaters*. That on the revival of the judgment by the *scire facias*, *Wood* well knew of the purchase of the

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land by the plaintiffs, and their settlement thereon : that the plaintiff, *Frederick Reigal*, has paid off his mortgage to *Wood*; but the other plaintiff being unable to pay, *Wood* has advertised their lands for sale, under the mortgage, and also put their bonds in suit. And the plaintiffs prayed for an injunction to stay his proceedings, and for relief, &c.

The answer of *Thaddeus M. Wood* denied all knowledge of the mortgage to *Myers*, and of the plaintiffs being in possession at the time of the sheriff's sale under the judgment. This defendant also stated, that a judgment was obtained in *January*, 1789, against *John Smith* and *A. Wood*, on notes given to *Avery* and *James Bennett*, for 67 dollars and 90 cents damages, and 20 dollars and 81 cents costs. That, on the 25th of *February*, 1800, *Smith* paid 64 dollars on the judgment, and no more. That, in *November*, 1807, a *scire facias* was issued to revive the judgment, which was served personally on *Smith*, who appeared by attorney, and pleaded payment; and on a trial, in *September*, 1809, a verdict was found for the plaintiff for 88 dollars and 77 cents, on which a judgment was docketed the 17th of *November*, 1809, and the costs taxed at 29 dollars and 63 cents. That, in April, 1810, a *fi. fa.* was issued on the judgment, and, on the 2d of *June*, 1810, the lot No. 54., in *Manlius*, was sold at the sheriff's sale to the defendant, *Hall*, who bid for the defendant, *Wood*, for the sum of *two dollars*, and a deed was executed to *Hall* and *Wood*. That, on the 10th of *June*, 1810, some of the plaintiffs called on *Wood*, and informed him that they were in possession of the lot, and requested information, which he gave them, and referred them to the records. That they, afterwards, said that they were satisfied that the defendant, *Wood*, could hold the land under his purchase. That, at the request of the plaintiffs, he released the land to them, for the balance due on the judgment against *Smith* and *Wood*, the costs of the *sci. fa.*, and his charges for attending the sale and drawing the bonds and mortgages, recording, &c., amounting to 108 dollars, including sheriff's fees, &c., with

the additional sum of 200 dollars, being part of a debt of 300 dollars which *John Smith* owed him, *Wood*, on his private account; and the plaintiffs gave him their bonds and mortgages for the above amount. That the defendant, *Wood*, did not pretend to hold the land by virtue of the judgment in favour of *Peter Smith*; that his offer to release was gratuitous, considering his title good under the purchase; and he told the plaintiffs, that he ought to be secured part of his own debt against *John Smith*, who had become insolvent. That he offered to give up the bonds and mortgages, if the plaintiffs would reconvey the land, and place him and *Hall* in the situation they were in before.

That if *John Smith* ever paid any thing in boards, it was on his private account, and not on the judgment.

John Smith, who was examined as a witness, 77 years of age, and had been blind for the last twelve years, said, that he had paid *Wood* 64 dollars on the judgment, for which he had a receipt, which he had lost, and, afterwards, paid him the balance, including costs, in boards. He said that the purchase of the plaintiffs, who took possession of the land, and their possession, was well known in the vicinity, and the witness told *Wood* of it before the sheriff's sale; that he had employed *Wood* as his attorney in various suits, and paid him all the costs due to him; that *Wood* never demanded payment of any thing until September, 1813; that the *sci. fa.* was personally served on the witness, who employed *Forman* and *Sabin*, attorneys, to defend the suit, but was never informed of the time of trial, nor did he know of it.

George Hall stated, that on the trial of the suit, on *scire facias*, in 1809, a verdict was taken for the whole amount claimed by *Wood*; and a stipulation in writing was given, than any receipts which might be produced, of payments on the judgment against *Smith* and *Wood*, should be endorsed on the execution to be issued on the judgment on the *scire facias*. It appeared, however, from the evidence of

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1815. the deputy sheriff, that *Wood* endorsed on the execution delivered to the sheriff, directions to levy the whole amount, without any deduction.

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Hall further stated, that he attended the sale, and was resolved to bid up so as to save the debt due him and *Wood*; that *Wood* mentioned, at the sale, that *Smith* had conveyed the land to some persons, but he did not know who they were. He remembered that *Smith* paid *Wood* some account in boards; that *Wood* told the plaintiff he could hold the land on the purchase at the sheriff's sale, but he only wanted to make himself whole against *John Smith*.

Sabin, who was attorney for *Smith*, stated, that *Smith*, in 1808, being poor and blind, removed to *Herkimer*; that he wrote to him concerning the *scire facias*, and *Smith* answered that the judgment had been paid; that he was old and poor, and it would not avail him to attend to it.

Gold, for the plaintiffs.

Kirkland, for the defendants.

THE CHANCELLOR. It appears to me, from a view of all the facts and circumstances attending this case, that I am bound to consider the judgment upon the *scire facias* as unduly obtained, and that the defendant cannot, in justice and good conscience, be permitted to hold any advantage which he may have obtained under it. It is a well-settled principle, in this court, that relief is to be obtained not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition. (*Barnesly v. Powel*, 1 *Ves.* 120. 284. 289.)

Wood, the principal defendant, admits, in his answer, that when he undertook to revive the judgment of *Avery & Bennett v. Smith & Wood*, there was but 3 dollars 96 cents of the debt due. His object, certainly, was not that small balance; and it does not even appear that, as to that sum, he had any

direction to issue the *scire facias*, from the persons in whose names it was issued, or to whom the money was due. It is evident his object was to secure another and larger demand against *Smith*, totally unconnected with the judgment, and that, as *Smith* was insolvent, as well as old, blind, and helpless, he sought to secure this demand by a contrivance calculated to defeat the title of the unsuspecting purchasers holding lands under *Smith*. It is in proof, that he knew that *Smith* had conveyed his interest in lot 54., in *Manlius*, to third persons ; and the inference is irresistible, from his frequent intercourse with that town, that he knew that the land was in the actual occupation of the purchasers, and had received large and valuable improvements. No notice, however, is given to them, as ter-tenants, of the *scire facias*. We have reason to presume it was intentionally avoided, and he is content with a service of the writ on that very old and blind pauper, who had neither interest nor disposition to take care of the suit, and who, about that time, had gone, or removed, to a distant county. A verdict is, accordingly, obtained upon the *scire facias*, without any opposition from *Smith's* uninstructed counsel, for the whole amount of the original judgment, though he knew, at the time, that it had long before been nearly, if not entirely discharged. He issues his execution, and directs the whole of the judgment to be levied ; and the sheriff, under his direction, sells, not upon the premises, but in another town, all the lands of the present plaintiffs, and which had cost them, eight years before, near 2,000 dollars. This sale, as well as the previous proceedings, was unknown to the plaintiffs, and the lands were bid off by a partner of *Wood*, for his use, at a nominal sum. This partner says, that he bid to save the debt of him and *Wood*, and which, as it appears, consisted chiefly of an antiquated account of costs and charges, as attorneys for *Smith*. Having thus acquired a title, *Wood* imposes terms upon the plaintiffs as the previous owners of the land. He insists upon the payment of the principal part of his

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demand against *Smith*, and compels them to redeem their land by giving him bonds and mortgages to the amount of 308 dollars. *Smith* denies that any part of that demand is due; and whether it be so or not, the settlement cannot be binding upon the plaintiffs; for the same imposition which attended the judgment, also infected this settlement, as it was made by them, totally uninformed of their rights, and in ignorance of the fraud by which the judgment was procured.

I think the weight of evidence is, that the whole of the original judgment, costs as well as debt, had long before been satisfied. *Smith* testifies that he had paid not only the small balance of the debt, but the costs, in boards; and another witness (*Hall*) says, that *Wood* had the benefit of some boards upon some claim which *Wood* had against *Smith*; and in the account exhibited by *Wood*, in this cause, he gives no credit, and makes no mention of the boards.

I am of opinion, therefore, that *Wood* cannot be permitted to acquire and hold any advantage whatever under the judgment obtained upon the *scire facias*, and that the whole proceeding was an imposition upon the plaintiffs. I shall, accordingly, decree, that the bonds and mortgages mentioned in the pleadings be given up and cancelled, and that the money which has been paid upon one of the bonds and mortgages be refunded, with interest; and that the defendant, *Wood*, pay the costs of this suit; and that the bill, as to the other defendants, be dismissed without costs.

Decree accordingly.

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BROUGH
V.
MILLARD.

April 14th.

CHEESEBROUGH AND OTHERS against MILLARD AND OTHERS.

MILLARD AND OTHERS against CHEESEBROUGH AND OTHERS.

If a creditor has a *lien* on two different parcels of land, and another creditor has a subsequent *lien* on one only of the two parcels, and the prior creditor elects to take his whole demand out of the parcel of land on which the subsequent creditor has his *lien*, the latter is entitled either to have the prior creditor thrown upon the other fund, or to have the prior *lien* assigned to him, for his benefit.

So, if a bond creditor exacts the whole of his demand from one of the sureties, that surety is entitled to be *substituted* in his place, and to a cession of his rights and securities, as if he were a purchaser, either against the principal debtor or his co-sureties :

And if the prior creditor has put it out of his power to make the cession, it seems, that he will be excluded from so much of his demand as the surety, or subsequent creditor, might have obtained, if the cession could have been made :

But if the prior creditor, who has disabled himself from making the assignment, has acted with good faith, and without knowledge of the rights of the other creditor, he is not to be injured by his inability to make the cession ; the doctrine of *substitution* being founded on mere equity and benevolence.

Where a bond, payable in *two* instalments, was secured by a mortgage on a *mill*, &c., and the debtor, afterwards, gave a second mortgage on six other lots of land, specifically, to secure the payment of the first instalment, but without reference to the first mortgage ; and all the parties, afterwards, by an arrangement between them, declared the second instalment paid, and cancelled the first mortgage, leaving the second mortgage to remain as security for the first instalment ; and at a sale of the six lots, under a subsequent judgment, which was a *lien* on the equity of redemption, in these lots only, A. purchased *two* lots, and B. *four* lots, knowing, at the time, the situation of the mortgage ; and B. afterwards purchased the second mortgage, and filed a bill to foreclose : it was held that A. was bound to contribute towards the satisfaction of the principal and interest due on the first instalment, according to the actual relative value of the lots, and not according to the prices for which they were sold at the sheriff's sale.

THE following are the material facts on which the controversy between the parties in the above causes arose, and

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will be sufficient to explain the grounds on which the decision of the court turned, without a minute detail of the voluminous pleadings and proofs.

On the 22d of December, 1803, *Thomas Smith*, of *Milton*, county of *Saratoga*, executed a bond to *Ambrose Millard*, (defendant,) and *Benajah Millard*, for the payment of 3,500 dollars, in two instalments, with interest; and to secure the payments, he, at the same time, executed a mortgage on certain mill-property, in *Ballston*. Afterwards, on the 17th of March, 1804, *Smith*, as collateral security for the payment of the *first* instalment, and the interest on the bond, executed a second mortgage, on six lots of land in the village of *Waterford*, and about which the present controversy arose. The second mortgage recited the bond, and that the mortgage was given for securing the payment of the first instalment, and interest, but made no mention whatever of the first mortgage. By the endorsements on the bonds and mortgages, it appeared, that on the 8th of June, 1808, *Samuel Bacon*, and on the 26th of October, 1808, *Benjamin Marvin*, also became interested in the bond and securities; and by some arrangements of the parties, *Marvin* was, at that time, considered as the owner of the first mortgage, and *Ambrose Millard*, one of the mortgagees in the first mortgage, as owner of the second mortgage. Afterwards, on the 12th of January, 1809, by agreement between all the parties concerned in the two mortgages, *Smith* was credited on his bond with the payment of the *second* instalment, and *Marvin* discharged the *first* mortgage; and the first instalment which was declared to be unpaid, was left to rest for its security on the *second* mortgage. The chief object of this arrangement appeared to have been to accommodate third persons, *Miller* and *Tayler*, who were interested in the mill-property. Before this arrangement, however, was made, *John Van Schaick* and *Mynderi Van Schaick*, jun., (defendants in the first suit,) had, on the 13th of June, 1808, obtained a judgment in the supreme court against *Smith*, the mortgagor, which bound his equity of re-

demption in the second mortgage; his interest in the lands covered by the first mortgage having been passed away by him.

An execution was issued on the judgment of *J. and M. Van Schaick*, and the lots included in the second mortgage were sold by the sheriff, in January, 1810; and, at the sheriff's sale, the plaintiffs in the first suit became the purchasers of two of the lots, with full knowledge, at the time, of the existence of the second mortgage, and of the discharge of the first mortgage; the other four lots were purchased by *J. and M. Van Schaick*, the plaintiffs in the execution.

Afterwards, on the 7th of December, 1810, *John D. P. Dow*, (defendant also in the first suit,) as trustee of the joint interest of himself and *J. and M. Van Schaick*, took from *Ambrose Millard* an assignment of the bond and second mortgage, in order to be protected against it; and proceeded to foreclose the mortgage by advertising the sale of the mortgaged premises at auction, under a power of sale contained in the mortgage. The plaintiffs in the first suit, who were the purchasers of two of the lots, then offered *Dow* and *Van Schaick* to contribute to the discharge of the second mortgage, according to the relative value of those lots, estimated by the sheriff's sale, but this offer was refused.

The plaintiffs in the first suit, as purchasers of the two lots, then filed their bill the 19th of July, 1811, to be discharged from the second mortgage altogether, on the ground of *fraud*, &c., or to be relieved, on contributing rateably to the payment of the moneys secured by the mortgage; and also, for an injunction against the proceedings of *Dow* under the mortgage.

The plaintiffs in the second suit filed their bill the 23d of November, 1811, to compel the plaintiffs in the first suit to redeem the mortgage by contributing according to the actual relative value of the lots, or that the equity of redemption as to those two lots be foreclosed.

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1815. *Woodworth*, for the plaintiffs, in the first, and for the defendants in the second, cause.

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Henry, contra.

THE CHANCELLOR. The controversy resolves itself into these two questions:

1st. Whether *Cheesebrough and others* are bound to contribute towards the payment of the mortgage?

2dly. If they are, then what is to be the rule of contribution?

1. The weight of testimony is decisive in proof of the agreement and understanding of all the parties to the bond and mortgages, that the payment of the 1,902 dollars and 78 cents, for which the receipt was given by *Bacon*, and the certificate of discharge by *Marvin*, was to be applied to the discharge of the second, and not of the first, instalment. This appears from the depositions of *Bacon*, *Cook*, and *G. Van Schoonhoven*, and from the certificate itself. I see no room to doubt of the intention of the parties, or of the validity of the arrangement. It was one which they were competent to make, and it was evidently made in good faith, and for their mutual convenience, without any intention injurious to others. The first mortgage was, therefore, absolutely discharged, and the second mortgage remained binding as a security for the first instalment; and it cannot now be questioned, or denied, to be a subsisting encumbrance, unless the purchaser, under the judgment, can show some equitable right arising out of the circumstances of the case, to be protected from its operation.

I admit, as a principle of equity, that if a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of those parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled, either to have the prior creditor thrown

upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him. This is a rule founded in natural justice, and I believe it is recognised in every cultivated system of jurisprudence. In the *English* law, it is an ordinary case, that if a party has two funds, he shall not, by his election, disappoint another who has one fund only, but the latter shall stand in the place of the former, or compel the former to resort to that fund which can be affected by him only. (*Sagitary v. Hyde*, 1 *Vern.* 455. *Mills v. Eden*, 10 *Mod.* 488. *Attorney General v. Tyndall, Amb.* 614. *Aldrich v. Cooper*, 8 *Ves.* 388. 391—5. *Trimmer v. Bayne*, 9 *Ves.* 209.) The party liable to be affected by this election, is usually protected by means of *substitution*. Thus, for instance, if the creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities as if he was a purchaser, either against the principal debtor or the co-sureties. This doctrine of substitution, which is familiar to the civil law, (*Dig.* 46. 1. 17. and 56. *Voet*, h. t. s. 27, 29. 30,) and the law of those countries in which that system essentially prevails, (*Pothier's Traite des Oblig.* n. 275. 280. 427. 519, 520. 522. *Kains' Equity*, vol. 1. 122. 124. *Hub. - Prælec. Inst.* lib. 3. tit. 21. n. 8,) is equally well known in the *English* chancery. In the case, *ex parte Crisp*, (1 *A&T.* 133.) Lord Hardwicke said, that where the surety paid off a debt, he was entitled to have, from the creditor, an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion; and in *Morgan v. Seymour*, (1 *Ch. Rep.* 64,) the court decreed that the creditor should assign over his bond to the two sureties, to enable them to help themselves against the principal debtor. To apply, then, the general principle to the present case, if the first mortgage had not been discharged, and the mortgagee had chosen to enforce the payment of the whole first instalment, from the lands covered

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by the second mortgage, to the loss, perhaps, of the lien of the judgment creditor by the consumption of the subject, that creditor, and, probably, the purchaser under the judgment, would have been entitled, either to have turned him from the path he had taken, or to the aid of the first mortgage, to recover a proportional indemnity from the other lands covered by that mortgage. But, in this case, the first mortgage is cancelled, and no such recourse can be had; and the question which arises is, whether the second mortgage can, in such case, be enforced? It appears from some of the authorities to which I have referred, to be well settled, that if the creditor has put it out of his power to make the assignment, he is, in many cases, to be precluded from so much of his demand as the surety, or younger creditor, might have procured, if the cession could have been made. *Repellitur exceptione cedendarum actionum.* And if the judgment creditor, in this case, had given notice to the owner of the first mortgage, before the arrangement and discharge took place, of the equity which he claimed and expected, I might, probably, have been inclined to have stayed, to a certain extent, the operation of the second mortgage. But there is no evidence, or even ground for presumption, that either *Marvin* or *Millard*, the owners of the mortgages, knew of the existence of the judgment when the arrangement was made and carried into effect. They were not bound to search for the judgment, and the record was no constructive notice to them; and as this rule of substitution rests on the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it, is not to be injured thereby, provided he acted without knowledge of the other's rights, and with good faith and just intention, which is all that equity in such case requires. (*Pothier's Traité des Oblig.* No. 520.) "The other debtors and sureties," to adopt the observations of *Pothier*, "might, as well as the creditor, have taken care of the right of hypothecation which he has lost; they might summon

him to interrupt, at their risk, the third purchasers, or to oppose the decrees. It is only in the case in which they may have put the creditor *in default*, that they may complain that he has lost his hypothecation."

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Nor have *Cheesebrough and others* any peculiar equity on their part, to entitle them to set up the discharge of the first mortgage as an equitable bar to contribution. They came in as purchasers at the sheriff's sale long after the discharge had taken place, and with notice of that fact, and of the existence of the second mortgage. They were, accordingly, duly apprized of the condition of the subject which they purchased, and they had even taken the advice of council, whether the second mortgage was a valid and subsisting encumbrance. And, before the commencement of their suit, they had admitted its validity by offering to contribute to its discharge, and actually tendering in money what they deemed their just proportion. Under all these circumstances, they have no equity as against the second mortgage; and I am of opinion, on every view of the point, that the mortgage is not discharged, and that the owner of it is entitled to have it satisfied out of the lots which it originally covered.

2. The rule of contribution between the parties, as owners of the different lots, must be the actual relative value of the lots, and this value is to be ascertained by the testimony of witnesses, in preference to estimating it by the price at which they were respectively purchased at the sheriff's sale. Such sales are by no means a sure and certain test of value; and I see no good reason why we should depart from the better standard, and adopt this precarious one, which is liable to constant variation, and must depend, in a great measure, upon contingencies. The object of the principle of contribution is equality in the support of a common burden, and the law upon this point, as Lord Coke observed in *Sir Wm. Herbert's case*, is "grounded upon great equity;" and equity has a regard to the *true* value, and not one depending upon

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contingency and speculation. The rumour prevailing at the sale, that the lots might be affected by some voluntary conveyances of the original mortgagor, has been urged as a reason for taking, in this instance, the auction price; but I do not perceive the force of the argument. The rumour, it is to be presumed, affected, in equal proportion, the price of all the lots, and leaves the general rule just as applicable as before. I shall, accordingly, as the best evidence of value, adopt the relative valuations made by the witnesses, *J. Van Schoonhoven* and *Mandeville*, and which is as follows, viz :

Lot No. 133	\$700
134	2,500
135	300
138	550
139	400
140	300

A reference must, therefore, be made to a master, to compute the sum due from the plaintiffs, *Cheesebrough and others*, as purchasers of lots No. 134. and 139., on this ratio of contribution towards satisfaction of the principal and interest due on the first instalment of the bond, and also the costs of advertising under the power contained in the said mortgage. The question of costs, in these suits, is reserved until the coming in of that report.

Decree accordingly.

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April 15th.

Where the *legal* and *equitable* estates in land, being co-extensive, unite in the same person, the *equitable* is merged in the *legal* estate, which descends according to the rules of law.

Thus, if the *legal* estate in fee descend, *ex parte materna*, and the *equitable* estate in fee, *ex parte paterna*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate.

As where A. having paid money for the purchase of land, died before any conveyance was made, and B., afterwards, took a conveyance of the land, in trust, for the infant daughter of A., to whom he, afterwards, executed a deed in fee, she was held to have acquired the *legal* estate by *purchase*; and on her death, without issue, the estate descended to her brothers and sisters of the *half-blood*, to the exclusion of her *paternal uncle*.

Where a deed has been duly executed and delivered, a subsequent surrender or destruction of it, will not divest the estate conveyed by it.

**THOMAS NICHOLSON.** (the brother of the plaintiff, John,) and *John Cantine*, now deceased, made a joint location on 4,132 acres of land in the township of *Chemung*; and before they obtained the patent, *Nicholson* died, the 4th of *January*, 1792. A patent was, afterwards, issued to *Cantine* for the lot No. 122., containing 4,000 acres, one moiety of which he held as trustee for the heirs of *Thomas Nicholson*, deceased, who died intestate, without issue, leaving his wife *Rebecca*, *enseint* of a female child, born in *May*, 1792, and named *Eliza Bradner*. Before the 19th of *November*, 1792, *Cantine*, by an agreement with the widow, conveyed to her infant daughter, *Eliza Bradner*, in fee, two parcels of 1,640 acres, and 410 acres, making together about one half of the lot so held in trust by him. By the advice of *John Nicholson*, father of *Thomas Nicholson*, deceased, and of *Benoni Bradner*, father of his wife, and with her consent, the deed was given up to *Cantine*, and is lost or destroyed; and, instead thereof, *Cantine*, on the 19th of *November*, 1792, conveyed to the infant daughter, in fee, for

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the consideration of 750 dollars, 1,640 acres, part of lot No. 122, in *Chemung*; and on the same day conveyed to the widow 410 acres, parcel of the same lot, in fee, for the consideration of 250 dollars. The widow of *T. N.*, deceased, intermarried with *Z. Halsey*, by whom she has had five children, all infants, and who are made defendants by their guardian. The infant daughter of *T. N.* died the 29th of *January*, 1811, intestate, and without issue, leaving the plaintiff, her eldest uncle, in the paternal line, and as he alleged in his bill, entitled by right to the inheritance of the said *Eliza B.*, deceased. The plaintiff stated, that he apprehended that, in consequence of the irregular proceeding of *Cantine*, the plaintiff's succession to the estate was impeded, and that the same may have descended at law to the children of *Rebecca*, by her second husband, being the brothers and sisters of the infant *Eliza*, deceased, of the *half-blood*. That *Thomas Nicholson*, in his lifetime, purchased of one *Bell*, lot No. 26., in *Romulus*, containing 600 acres, for which he paid 150 dollars, and took a conveyance in fee; that *Bell* having, afterwards sold the lot to *Wm. Thompson*, and a dispute arising between the infant *Eliza* and *Thompson*, as to the land, *Thompson*, for the consideration of 100 dollars, executed a release to her of all his claim to the lot. The plaintiff charged that the wife of *T. N.* received of the personal estate of her husband 1,500 dollars, a sum beyond all the property she brought on her marriage.

The defendants, in their answers, alleged, that the lands in *Chemung*, and the lot in *Romulus*, were purchased with the proper money of *Rebecca*, the wife of *T. Nicholson*, advanced to her by her father, before her marriage, and not with the property of her husband, who left no estate, except a bond of 400 dollars; that the substituted deeds were given in order that she might have a part, and under a verbal promise of indemnity to *Cantine*; and they insisted, that, notwithstanding those deeds, the infant daughter of *T. N.* continued seised in fee of the whole 2,050 acres, and that the inheritance de-

scended wholly to her brothers and sisters of the half-blood. That two of the *Onondaga* commissioners, on the 10th of September, 1800, adjudged that the title in lot No. 24., in *Romulus*, was in the infant *Eliza B. Nicholson*. That the lot was granted to one *Sampson*, a soldier, the 9th of July, 1790, who sold the lot to *Thompson*, the 14th of December, 1791, who released on the 2d of April, 1799, to the infant. That her father purchased the lot of one *Bell*, who obtained a conveyance from *Sampson*, dated the 26th of March, 1784, when *Sampson* was an infant, and under age; so that the title of *Nicholson* was not valid in law; and that *B. Bradner* purchased the title of *Thompson*, for the use of the infant, and obtained the award of the commissioners in her favour. That the debts of *T. Nicholson*, at his decease, greatly exceeded his estate, and that the widow had never received any thing for what she brought him on her marriage.

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*Gold*, for the plaintiff, contended, 1. That *Thomas Nicholson*, having paid for a moiety of the lot in *Chemung*, was entitled to a conveyance; and, on the day of his death, was vested with an equitable estate in such moiety, subject to the same law of descents as a legal estate. (2 *Powell on Cont.* 56. 3 *P. Wms.* 211. 1 *Eq. Cas. Abr.* 175. pl. 5. 10 *Mod.* 515. 2 *Vern.* 679. 2 *P. Wms.* 629. 1 *Vern.* 298. 471.)

2. That if moneys, as alleged, had been advanced to the wife of *T. N.* by her father, as her marriage portion, they were received by him, in virtue of his *marital rights*; and, if vested in the lands in question, created no lien in favour of the widow, but the land descended to the heirs of the husband, as though the legal title had been vested in him at the time of purchase. (2 *Powell on Cont.* 93, 94. 2 *Vern.* 20. 322. *Sugden's Law of Vend.* 427. 2 *Eq. Cas. Ab.* 138. pl. 5.)

3. That the destruction of the deed to the infant, and the subsequent deeds, were unauthorized, and could not alter or

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4. That the 100 dollars paid to *Thompson*, for his claim, to quiet the title, was not the consideration of an original purchase, and cannot affect the title of *T. Nicholson*, which, according to the evidence, was a valid legal title; or if it were questioned, an issue should be directed to ascertain its validity at law.

*Henry*, contra, contended, 1. That by the execution of the trust, the legal and equitable titles were united, and the trust merged in the legal estate: and, 2. That the court will not open the descent, so as to separate the legal and equitable estate, and alter the course of descent. This is an attempt, by a collateral relation, to deprive the half-blood of their right. The father did not die seised, for no legal estate had passed. The state could not be a trustee by implication. No person stood seised in trust for him. After his death the patent for the lot issued, and then *Cantine* became seised of the moiety in *trust* for the daughter, *en ventre sa mere*. The trustee conveyed this moiety, *in fee*, to the infant, the *cestuy que trust*. She was, then, seised in *fee*, and the *fee* could not be devested by the destruction of the deed, without her assent. The subsequent deeds were mere nullities. The trust was *executed* by the first conveyance, and the rights of the daughter were vested and fixed in her as a *purchaser*; and having the estate as a purchaser, and not by descent or gift from her father, there could be no doubt on the case.

(*Cruise's Dig.* tit. *Descent*, ch. 3. s. 49, 50. *Goodright v.*

\* S. C. 3 Ves. *Wells, Doug.* 771.\*

jun. 339.

Admitting that the purchase money came from the maternal grandfather, yet the defendants would have the superior equity. If not, yet, as heirs, their equity was *equal*; and having the legal estate, this court will not disturb them. (2 *Vernon*, 578.)

As to the lot in *Romulus*, the deed from *Thompson* was direct to *Eliza B. Nicholson*, who thereby became a *purchaser*. But if *Thompson* had no title which he could convey, then she took by descent; and the plaintiff, having a complete remedy at law, cannot come to this court for relief.

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*Gold*, in reply, insisted, that *Cantine*, having received the money, was a trustee in the lifetime of *T. Nicholson*, and that equities descend as real estates; that the state could be a trustee, as where a contract was made with the land-office, and part of the purchase money paid before the patent issued; and a *mandamus* would lie to compel a conveyance on completing the payment. The equitable estate descended to the infant daughter of *T. Nicholson*, who was entitled to the deed from *Cantine* on no other ground than as the *heir* of her *father*. The case of *Goodright v. Wells* was distinguishable from the present. It is impossible to say that the estate is not *derived* from *T. Nicholson*. The case is, then, within the spirit and meaning of the fourth canon, in the statute of descents. (3 *Cruise's Dig.* 401. tit. 29. c. 3. s. 54. 56, 57.) An equitable estate will be supported at law. (3 *Johns. Rep.* 216. *Foote v. Colvin.*)

This court has jurisdiction in cases of lost or suppressed deeds; and where the court has acquired jurisdiction for the purpose of discovery, or otherwise, it will retain the suit, in order to do complete justice between the parties, and to prevent useless litigation. (*Coop. Eq. Pl.* 28. 2 *Johns. Cas.* 424.)

**THE CHANCELLOR.** This is a claim to the inheritance made by the paternal uncle of *Eliza B. Nicholson*, against her brothers and sisters of the half-blood.

The statute of descents says, that brothers and sisters of the half blood shall inherit equally with those of the whole blood, unless the inheritance come by descent, devise, or gift, of some ancestor of the person dying seised, in which

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case all who are not of the blood of such ancestor are excluded.

*Eliza B. Nicholson* died in infancy, seised in fee of a moiety of 4,000 acres of land in *Chemung*, and of the whole of lot No. 24., in *Romulus*.

The testimony is conclusive, that *John Cantine*, in his lifetime, conveyed to her the moiety of the *Chemung* lands. This conveyance was afterwards delivered back to *Cantine* by her mother, and new deeds taken to the infant and her mother, of the same lands, in separate and unequal portions. The first deed is supposed to have been destroyed after it was delivered up, and it cannot now be found. This subsequent surrender and destruction of that deed could not divest the infant of the estate of which she was seised under that deed, and she must have transmitted, by descent, her interest in the same, unimpaired, to her heirs at law. This is a clear and undeniable proposition; and as she is to be considered as having acquired the legal estate by purchase; the question is, whether this court can now, in aid of the heir, *ex parte paterna*, take notice of the equitable title to those lands which she inherited from her father, and which was afterwards united with the legal estate by means of the conveyance from *Cantine*? It may be laid down as a settled principle, that when the legal and equitable estates (being co-extensive) unite in the same person, the equitable estate is merged in the legal, and may be said no longer to exist for the purpose of being recognised and acted upon by this court. The legal estate is left to prevail according to the rules of law. The existence and truth of this principle has been frequently declared both in courts of law and equity. Thus, in *Goodright v. Wells*, (*Doug. 771.*.) it was acknowledged, that if the legal interest descend in fee, *ex parte materna*, and the equitable interest in fee, *ex parte paterna*, the equitable estate merges in the legal, and both follow the line through which the legal estate descends; and the court held, that after such union, the legal

and equitable estates should not open on the death of the person so seised, and be severed for the claim of different heirs. The judges said, there was no such case in law or equity, and there was no reason for it; for the moment both estates met in the same person, there was an end of the trust, as a man could not be a trustee for himself. And, to use the language of Lord *Mansfield*, "why should the estates open at his death? What equity has one set of heirs more than the other? The legal estate draws the trust after it, and the latter is not to be revived so as to make the heir at law of one denomination a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. There is no room for *chancery* to interpose, and the rule of law must prevail."

The case of *Doe v. Putt*, cited from the C. B., was considered, by the K. B., as having established the same doctrine, and to have ruled that the *cestuy que trust*, taking the legal estate from the trustee, as a purchaser, thereby altered the course of descent.

The principle advanced in the case from *Douglas' Rep.* was afterwards sanctioned by Lord *Thurlow*, in *Wade v. Paget*, (1 *Bro.* 364.) and by the Master of the Rolls, in *Philips v. Brydges*, (3 *Ves.* 126, 127.) and again, in *Selby v. Alston*; (3 *Ves.* 339.) this last case arose on a bill by the paternal heir, claiming the estate as heir of the equitable title, against the heir on the maternal side, who was in possession, and claimed as the heir to the legal estate. The case is much in point, and presses strongly on the one before us. The court there held, that after the union of the equitable and legal estates in the same ancestor, the former was absorbed and gone; and the bill was dismissed because the paternal heir had no equity.

The plaintiff, then, under the authority of these cases, and the principle which they so clearly and so rationally establish, was no claim to the assistance of the court in respect to the *Chemung* lands. There can be no doubt that the

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1815. *infant cestuy que trust*, by means of the conveyance from Cantine, the trustee, took the legal estate as purchaser; and, consequently, if the legal and equitable estate, so united by that purchase, were not, afterwards, severed and revived by her own act, and cannot be considered as opening at her death, she must have transmitted the entire inheritance by descent to her brothers and sisters of the half-blood.

With respect to the military lot, a single observation appears to me to be sufficient.

If the title to the lot was in *Thompson* when he conveyed to the infant, she took as a purchaser, and the title descended to the defendants, as her heirs at law. But if the title was not in him, and had been previously acquired by her father, then she took by descent, and the plaintiff has a clear title at law, as her heir, to the exclusion of the half-blood, and there is no cause shown for calling in the extraordinary aid of this court. There is no allegation in the bill of any special ground for coming here to assert a dry legal title.

In every view which I have been able to take of this case, I think the plaintiff fails; and his bill must be dismissed, with costs.

Bill dismissed.

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v.

COOPER.

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April 24th,**STEVENS AND OTHERS against COOPER AND OTHERS.****COOPER AND OTHERS against STEVENS AND OTHERS.**

Where several lots of land are mortgaged, the mortgager, or purchaser under him, cannot set up a *parol* agreement, made at the time of the mortgage, that in case the mortgagor sold either of the lots, the mortgagee would release the lot so purchased from the mortgage, on being paid a certain sum, per acre, by the purchaser.

Where six separate lots, or parcels, of land were mortgaged, and the mortgagee, afterwards, released four of the lots from the mortgage, leaving the original debt to stand charged on the remaining two, it was held, that the two lots were chargeable with their ratable proportion only of the original debt and interest, according to the relative value of the six lots at the date of the mortgage.

Where land is charged with a burden, each part ought to bear no more than its due proportion of the charge; and equity will compel each part to a just contribution. And a creditor cannot, by any assignment or act of his, deprive the co-debtors, or owners of the land, of their right of contribution against each other.

THE original bill, which was filed April 7th, 1807, stated, that on the 16th of March, 1795, William Cooper conveyed to John Richardson, lot No. 98., in *Tully*; lot No. 88., in *Brutus*; lot No. 82., in *Camillus*; lot No. 29., in *Ulysses*; lot No. 72., in *Sempronius*; and lot No. 46., in *Dryden*; being 2,900 acres of land, for the consideration of 2,300 pounds, for which a bond and mortgage were given. That, at the time of purchase, it was agreed by Cooper, that on a sale of any of the lots, by Richardson, and the purchaser paying to Cooper, at the rate of two dollars per acre, with interest, he would release such lot from the mortgage; that Richardson sold lot No. 82., in *Camillus*, to William Stevens, who paid to him a sum of money above the two dollars per acre, which he was to pay to Cooper, to whom he made known the purchase and terms of sale, and who recognised

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the agreement with *Richardson*, and promised to release the lot on receiving payment of the two dollars per acre ; that *Stevens*, and others under him, made valuable improvements on the lot, and died *March 1st*, 1801, leaving the plaintiffs, his widow and children, and heirs at law. On the 20th of *July*, 1801, the plaintiffs paid to *Cooper* 600 dollars, who promised to apply it, exclusively, to lot 82, in *Camillus*, and gave a receipt accordingly. That the mortgage was transferred to *Abijah Hammond*; that *Richardson*, after he sold the lot to *Stevens*, sold lots 98., 88., 29., and 46., above mentioned ; and, in pursuance of the original agreement, obtained from *Cooper* a release of these lots from the mortgage, on giving him a bond and warrant of attorney to confess judgment thereon, for the amount due, at two dollars per acre, and which bond and warrant were received in discharge of so much of the mortgage. This *release*, which was executed the 24th of *October*, 1797, stated the mortgage, and that *Richardson*, being desirous to have part of the lots released from the mortgage, had offered ample security ; and as it was reasonable, he, *Cooper*, in consideration of the security, did release, &c. reserving the mortgage in full force against the other two lots, 72. and 82.; that, at the time judgment was entered upon the bond, *Richardson* was possessed of sufficient property to satisfy it; and a failure to collect the amount was owing to the indulgence of *Cooper*; that the plaintiffs have since tendered to *Cooper*, and to *Hammond*, the residue of the money due on lot 82., at two dollars per acre, if they would discharge the mortgage, which they refused to do, and have since proceeded to advertise the lot for sale, under the mortgage, &c.

*Cooper*, in his answer, dated the 21st of *April*, 1808, denied the parol agreement, stated in the bill, between him and *Richardson*. He alleged, that lot 82. was far' more valuable than the other lots ; that, before he made the assignment to *Hammond*, he would have been willing to have received from *Stevens* such part of the bond and mortgage as

would have been proportionate to the value of lot 82., and to have released the mortgage thereon, and may have so far promised: he admitted the release of the four lots, but denied that it was given under the pretended parol agreement; that, on the 21st of *July*, 1801, after the assignment to *Hammond*, which was for 7,500 dollars, the plaintiffs paid him 600 dollars, and he gave a receipt, stating that it was "for interest due on lot 82., in *Camillus*, mortgaged by him to *Richardson*, and since assigned, in part, to *A. Hammond*; of which sum, he paid over to *A. Hammond*," 550 dollars.

*Hammond*, in his answer, denied any knowledge of the agreement, but admitted that, at the time of the assignment to him, he understood that *Richardson* had sold the four lots, and that *Cooper* had released them from the mortgage.

The *cross bill*, filed the 19th of *May*, 1809, prayed, that the heirs, &c. of *Stevens* might be decreed to pay the 2,320 pounds, and interest, due on the mortgage, or that the lots 82. and 72. might be decreed to be sold, &c. *Richardson*, in his *answer*, set up the parol agreement, and stated that *Cooper* released the four lots, on *Richardson's* paying at the rate of two dollars per acre, pursuant to the agreement.

The other defendants also set up the same parol agreement as stated in the original bill.

The *parol* agreement stated to have been made at the time of giving the mortgage, was proved by several witnesses on the part of the plaintiffs.

*Van Vechten*, for the plaintiffs, contended, that the *parol* agreement was valid, as against *Cooper* and *Hammond*. It did not contradict the *mortgage*, which, moreover, was an interest of a *personal* nature, being a mere *incident* of the debt. (*Newland on Cont.* 197. *Rob. on Frauds*, 274. *3 Johns. Cas.* 322.)

*Hammond* took the mortgage subject to all equity existing between the original parties; (*Sugden's Law of Vend.*

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467. 2 *Johns. Rep.* 595. 4 *Vesey*, jun. 118. 289. 9 *Vesey*, 264.;) *Cooper* was his agent, and he must be regarded as a purchaser with notice. (2 *Fonbl.* 158. s. 4.)

Again, *Cooper* knew of the sale of the lot to *Stevens*, and had no right to discharge the mortgage from the four lots, and leave the whole debt charged on the other two; the lot sold to *Stevens*, at most, would be liable only to contribute its proportion of the original debt. (5 *Vin. Abr.* 561. (A.) pl. 4. 6. 13. 18, 19. 23, 24, 25. 27. 3 *Co. 12. Res.* 2. 2 *Pothier*, 18. 3 *P. Wms.* 98. 1 *Ch. Cas.* 271. 2 *Vern.* 117.) At any rate, the plaintiffs ought to be exonerated from the mortgage, on paying two dollars per acre, with interest.

*Henry*, contra, contended, that evidence of the parol agreement was inadmissible, for it was contradictory to the deed of mortgage. By that deed, each lot was bound for the whole debt. The agreement makes each lot answerable only *pro rata*, and thereby substantially varies the written deed.

He, then, entered into a minute examination of the parol proof, and contended, that it was contradictory and uncertain, and showed how important it was to adhere to the established rule of evidence, which precluded the admission of parol evidence to vary a written instrument.

**THE CHANCELLOR.** 1. The plaintiffs in the original suit seek to avail themselves of a parol agreement, alleged to have been made between the parties to the mortgage at the time it was executed, by which each lot was to be bound only for a ratable proportion of the mortgage debt. The mortgage in this, as in ordinary cases, bound every part and parcel of the mortgaged premises for the entire debt, and if such a parol agreement, as is charged, can be proved and set up, it goes to vary, essentially, the operation of the mortgage deed.

This agreement is proved by *Richardson*, the mortgagor, as being concurrent with the execution of the mortgage, and part of the original agreement. It is as explicitly denied by the mortgagee in his answer. Two witnesses, however, prove subsequent conversations with the mortgagee, in which the agreement was admitted, but the release executed by *Cooper* to *Richardson*, in October, 1797, and accepted by him, is pretty strong evidence that no such agreement was then understood to exist.

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It is, however, unnecessary to enter into an examination of the weight due to the parol proof, for I am satisfied that the objection, upon the argument, to its admissibility, was well taken. There is no rule of evidence better settled, than that which declares that parol evidence is inadmissible to contradict, or substantially vary, the legal import of a written agreement. Such testimony is not only contrary to the statute of frauds, but to the maxims of the common law; and the rules of evidence on this, or on most other points, are the same in courts of law and of equity. (*Lake v. Philips*, 1 Ch. Rep. 59. *Binstead v. Coleman*, Bubn. 65. *Parteriche v. Powlet*, 2 Atk. 383. *Irnham v. Child*, 1 Bro. 92. *Portmore v. Morris*, 2 Bro. 219. *Meres v. Ansell*, 3 Wils. 275. *Preston v. Merceau*, 2 Black. Rep. 1249.) The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is as well grounded in reason and policy as it is in authority. Nor does this case come within any exception admitted here to the operation of the rule; for there is no allegation of fraud, mistake, or surprise, in making or executing the mortgage; and those, I believe, are the only cases in which parol evidence is admissible in this court against a contract in writing. (*Marquis of Townsend v. Stangroom*, 6 Ves. 328. *Rich v. Jackson*, ib. n.)

There is another rule which has some connexion with this branch of the law of evidence, and which will, in certain cases, and on certain terms, admit an agreement in writing,

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concerning lands to be *discharged* by parol. But the evidence in such cases is good only as a defence to a bill for a specific performance, and is totally inadmissible, at law or equity, as a ground to compel a performance in specie. (*Sugden*, 109—114., 3d *London* edition, where the cases are collected.) And the rule has no sort of application to this case, which sets up a parol agreement as being part of the original agreement, and the professed object of which is to alter, by substantially restricting, the legal effect and operation of the mortgage.

2. The next and only remaining point in this case is, whether the release by the mortgagee, on the 24th of *October*, 1797, of four of the lots included in the mortgage, does not, in equity, ratably reduce the power of the mortgage upon the remaining lots, inasmuch as it deprives the owners of those lots of their right of contribution as against the lots so released.

It is a doctrine well established, that when land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion ; and equity will preserve this equality by compelling the owner of each part to a just contribution. (*Sir Wm. Harbert's Case*, 3 *Co. 14. Harris v. Ingleden*, 3 *P. Wms.* 98, 99.) I need not go at large into this doctrine. It is perfectly well understood ; and I had occasion recently to examine it in the case of

\* *Ante*, p. 409. *Cheesebrough and others v. Van Schaick and others.*\* The court will likewise compel the creditor to aid this right of contribution, by assigning his bonds and securities to the debtor, or surety, or owner of the land, whom he charges with his whole demand, and they will not permit him, voluntarily, to defeat this right. He owes a duty to his debtors, not to impair their rights as against each other. But here the mortgagee has deprived the owners of lot No. 72. and 82. of this recourse, by previously discharging the other lots ; and he ought not, then, in equity, to charge them with a greater burden than they would have been subject to upon

the principle of contribution, if no such discharge had taken place. This is a clear and fundamental rule of justice, which must strike, at once, every discerning mind, and which *Pothier* has illustrated in his *Treatise on Obligations*, a work which is founded in sound ethics as well as upon the basis of the civil law. (*Traité des Oblig.* No. 275. 520.)

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I shall, therefore, direct a reference to a master to ascertain the proportion of the principal sum mentioned in the mortgage, with the interest, that would, as between the owners of the several lots, be ratably chargeable upon each of the six lots contained in the mortgage; and that, in making such apportionment, due regard be had to the relative value of each lot at the date of the mortgage; and that he take such proof on this point, as the parties may furnish; and that he further ascertain and report the proportion of the debt that lots 72., in *Sempronius*, and 82., in *Camillus*, would be jointly chargeable with upon such apportionment; and this latter sum, with interest, together with the costs of advertising under the mortgage, and after crediting what has been paid by the plaintiffs, is what they ought to be decreed to pay, or that the mortgage be foreclosed.

Decree accordingly.

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WOODWORTH

V.  
VAN BUS-  
KERK.

## WOODWORTH against VAN BUSKERK AND SLOCUM.

*April 29th.*

This court will not grant an injunction to stay an action at law, on an *award*; on the ground that the plaintiff was surprised by the principal witness, for the defendants, swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time of making the award.

The rule is the same in equity as at law, where a new trial will not be granted, merely to give a party, who has gone voluntarily to trial, an opportunity to impeach the testimony of witnesses, of the object of whose evidence he was apprized beforehand.

THIS was a bill for an injunction. It set forth an agreement with the defendants, relative to a quantity of timber to be drawn from the lands of the defendants, and rafted to New-York. The plaintiff settled with the defendants for 666 pieces of timber, but the defendants, alleging that the raft contained 1,000 pieces, brought an action against the plaintiff in the supreme court, for the difference; and the parties submitted the matter to the award of three arbitrators. At the hearing before the arbitrators, *W. Overacker* was the principal witness for the defendants; the bill alleged that the witness, before his examination, had repeatedly assured the plaintiff that the raft contained 666 pieces only; but that he falsely deposed before the arbitrators that it contained 1,000 pieces; and the plaintiff being surprised by his evidence, requested of the arbitrators to have another hearing, at a future day, when he would prove, by three witnesses who went with the raft, the falsehood of *Overacker's* testimony, and offered to enlarge the time for making the award; but the arbitrators refused to adjourn for a further hearing, and made an award in favour of the defendants, on the evidence of *Overacker*, for 250 dollars, on which a suit had been brought in the supreme court, against the plaintiff.

*Van Vechten*, for the plaintiff.

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WOODWORTH  
v.  
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THE CHANCELLOR. The plaintiff went to a hearing without objection, and was willing to rely upon the testimony of *Overacker*, the principal witness for the defendants. It is a rule at law, on the subject of new trials, that a party going voluntarily to trial, goes at his peril, and he cannot have a new trial merely to give him an opportunity of impeaching the testimony of a witness of whom he was apprized beforehand, and of the very purpose for which he was to be called. He must, at least, show that he had since discovered testimony of which he had no knowledge before the trial. (*2 Johns. Cases*, 319. *5 Johns. Rep.* 249. *9 Johns. Rep.* 78. *1 Wils.* 98. *2 Salk.* 653. *2 Binney*, 582. n.) There is no reason why an award should be set aside on the grounds stated, when a verdict cannot ; and that this court would not relieve, in such case, against a verdict, was fully considered in *Smith & Mead v. Lowry*.\* The reason of the rule applies equally in each \* *Ante*, p. 320. case, and the same mischief would follow from relaxing it. The power of awarding new trials at law, is exercised upon liberal and equitable grounds, and this consideration renders the rule, drawn from the practice of the courts of law, the more applicable. There is no chancery case, within my knowledge, that approaches to this. Besides, the arbitration bonds would, probably, have run out before the witnesses from *Cayuga* could have been procured ; and the defendants were not bound to enlarge the time, and the arbitrators had not the power.

Injunction denied.

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PARKER  
v.  
GRANT.

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*May 1st.***PARKER AND BLISS against GRANT AND OTHERS.**

The 11th rule of June, 1806, allowing the plaintiff to amend his bill, of course, at any time before answer, plea, or demurrer filed, without costs, does not apply to the case of a bill *sworn to* by the plaintiff as an injunction bill.

**PETITION**, by the defendants, to have the bill in this cause, which was an *injunction* bill, and had been amended by the plaintiff, taken off the files of the court; on the ground, that after the injunction had issued, and after the defendants' solicitor had given notice of his appearance, but before he had actually entered it with the clerk, or had put in an answer, the plaintiff had amended the bill in a material part without leave, or notice, and without the bill having been resworn to.

*D. Rodman*, in support of the petition.

*Van Vechten*, contra.

**THE CHANCELLOR.** The 11th rule of June, 1806, ought not to be applied to the case of a bill *sworn to* by the party. It would be like a party meddling with, and altering, his own affidavit on file, without leave; and it would become difficult, and, perhaps, impossible, afterwards, to know to what part of the bill the oath was to be applied. The letter of the rule does, undoubtedly, apply to the case, for it is general in its terms; and for that reason I shall only direct the amendment to be expunged, and shall suffer the costs of this application to abide the event of the suit.

Order accordingly.

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DOUGLASS

v.

WIGGINS

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May 19th.

DOUGLASS AND OTHERS *against* WIGGINS AND ANOTHER.

Injunction lies to prevent a lessee's making material alterations in a dwelling house, by changing it into a warehouse, or store, which would produce permanent injury to the building.

THIS was a bill for an injunction, to stay waste. It stated, that the defendants had taken a lease of a dwelling-house in *Pearl-street*, in the city of *New-York*, for four years, from the 1st of *May*, 1815; that the lease provided, that the defendants were to lay out 300 dollars in improvements, *to be approved of* by the lessors; that, against the consent of the lessors, the defendants were converting the whole dwelling house into a store, and were prostrating partitions, and cutting through the ceilings and floors in the second and third stories, and fixing a wheel and tackle in the third story to raise heavy packages, which would be to the great and constant injury of the building, as the timbers in the third story were weak.

*Anthon*, for the plaintiffs, cited *Bonnett v. Sadler*, 14 *Ves.* 526. *Amb.* 209. *Anon.* and *Bacon*, tit. *Waste*, c. 5.

THE CHANCELLOR. Let the injunction issue.

Motion granted.

1815.

MATTER OF  
LIVINGSTON.

June 5th.

*In the matter of MARY LIVINGSTON, a Lunatic.*

The custody of a lunatic's person and estate, real and personal, may be committed to the next of kin, or heir at law.

PETITION of *Alexander Crofts*, and *Mary*, his wife, stating, that on a commission, in nature of a writ *de lunatico inquirendo*, *Margaret Livingston* was found a lunatic; that she is the widow of *Robert T. Livingston*, deceased, and entitled to real and personal estate; that the petitioner, *Mary*, is the only child of the lunatic; that the lunatic is in a state of deplorable helplessness and lunacy, and has been so for many years, and is now, and has been, since the death of her husband, in 1813, in the care of the petitioners. Prayer, that they may be appointed to the custody of her person and estate.

*Henry*, in support of the petition.

*H. Bleecker*, contra, and on behalf of *Philip J. Livingston*, uncle of the petitioner, *Mary*, praying for the custody of the person of the lunatic.

THE CHANCELLOR. I agree with what was said by Lord *Macclesfield*, in *Dormer's Case*, (2 P. Wms. 262,) that there is no sufficient reason for the old rule against committing the custody of the person and estate of a lunatic to the heir at law. The rule, in many cases under our statute, would take a child from its parent, which would be most unnatural, and the rule has been held (*ex parte Ludlow*, 2 P. Wms. 638.) not to apply to the next of kin entitled under the statute of distributions to the personal estate. The daughter, in this case, is the most fit person to take charge of an aged

and afflicted mother ; and the presumption (if one must be indulged) would be in favour of kinder treatment, and more patient fortitude, from the daughter, than from the collateral kindred. I shall, therefore, direct, that the custody of the person and estate of the lunatic be committed to the petitioners, on their giving the requisite security.

1815  
WISER  
v.  
BLACHLY.

Rule accordingly.(a)

(a) Vide *ex parte Cockayne*, (*7 Vesey, jun. 591.*)

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**WISER, an infant, by her next friend, against BLACHLY  
and the Executors of VAIL.**

June 16th.

The general rule, that all persons whose interests may be affected by the decree must be made parties, is founded on convenience, and subject to exceptions and modifications, according to the discretion of the court.

Thus, a creditor, or legatee of the personal estate, need only make the personal representatives of the debtor parties to the suit; and, in many cases, where it will be attended with extreme difficulty, or very great inconvenience, the general rule will be dispensed with.

But on a bill against the executors of a guardian, for a breach of his trust, the testator having, by his will, made the timber on his land assets for the payment of his debts, it was held that the *devisee* of the real estate ought to be made a party, as the whole estate might become responsible to the plaintiff.

THE bill in this cause was filed against *Blachly*, the *guardian* of the plaintiff, and against the executors of *Vail*, who was a *surety* for the guardian, for a breach of trust by the guardian, and for an account.

The cause coming on to be heard, the counsel for the defendants objected to the want of proper parties; that as *Vail*, the testator, whose estate might be made responsible, had, by his will, rendered the timber growing on his land

1815. *assets for the payment of his debts, the devisee of his real estate ought, therefore, to be made a party.*

WISER

v.  
BLACHLY.

*Riggs, for the plaintiff.*

*Baldwin, contra.*

THE CHANCELLOR suggested some difficulty in deducing, from the books, any precise rule on the question of necessary parties. The general rule, he observed, is, that you must have before the court all parties whose interests the decree may touch, because they are concerned to resist the demand, and to prevent their fund from being exhausted by collusion. In *Gifford v. Hart*, (1 *Schoale & Lefroy*, 386.,) it was held, that a decree obtained without making parties those whose rights were affected, was fraudulent and void as to those parties. The same doctrine was declared, in the house of lords, in *Gore v. Stacpoole*, (1 *Dow's Rep.* 18.) in which it was held, that to make a foreclosure of a mortgage valid against all claimants, not only the tenant for life, but the remainder-men for life, and in fee, must be brought before the court, to give them an opportunity of paying off the mortgage if they thought proper. But the general rule is not of universal application. A creditor, or legatee of the personal estate, need not make any but the personal representative of the debtor a party, for the executor is to sustain the person of the testator, and to defend the estate for creditors and legatees. (1 *Ves.* 105. 131. 1 *Bro.* 303.) Lord *Loughborough* said, this was an anomalous instance, but later cases have created other exceptions to the general rule. On a bill to foreclose a mortgage, Lord *Alvanley* thought it intolerable to insist that all encumbrancers should be brought in ; (3 *Ves.* 314. ;) and the rule requiring the presence of all parties, is said to be a mere rule of convenience, and to prevent the court from doing business by halves ; and that it is subject to modification and discretion ; and that the court will be

satisfied that a sufficient number of the persons interested are before the court to sustain the question. In *Adair v. The New-River Company*, (11 *Ves.* 429.,) this point was much discussed, and it was held that the rule was to be dispensed with when extremely difficult; and that in a suit to establish the right of suit to a mill, the court only requires parties sufficient to secure a fair contest. The same principle governed in *Cullen v. Duke of Q—*, (15 *Ves.* 14. n.) where it was held sufficient to bring in the contractors or directors of a private society; and, in *Cockburn v. Thompson*, (16 *Ves.* 321.,) the subject was very diffusively discussed, and numerous instances given of a relaxation of the strict rule, that all persons materially interested must be parties. The rule is to be dispensed with where it is impracticable, or very inconvenient, as in the case of a very numerous association in a joint concern, which is, in effect, a partnership, and not a corporation.

The Chancellor, however, inclined to think, that, in this case, the general rule ought to prevail, as there was no necessity pressing against it; and the counsel for the plaintiff readily consented, upon this intimation, to postpone the hearing, in order to bring in the devisee.

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1815.

TUPPER  
v.  
POWELL.

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**TUPPER AND ANOTHER against POWELL AND OTHERS.**

June 19th.

This court will not aid a plea of usury, at law, by compelling a discovery, unless the debtor, in his bill, tenders the sum actually borrowed, with the lawful interest. He must first do what is equitable on his part, before he can ask the assistance of a court of equity.

THE bill stated, that the plaintiffs applied to Powell, one of the defendants, to borrow 500 dollars, on a note for that sum, payable in 60 days, made by one of the plaintiffs, and

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TOPPER
v.
POWELL.

endorsed by the other ; that *Powell* agreed to discount the note, and gave the plaintiffs 400 dollars, in money, and a quantity of indigo, amounting to 70 dollars, retaining the residue, or 30 dollars, as discount. That when the note became due, the plaintiff, in order to obtain a delay of payment, made and endorsed two other notes, for two hundred dollars each, payable sixty days after date, which notes, and 120 dollars in cash, they gave the defendants, who, thereupon, delivered up the note for 500 dollars, thereby receiving another sum beyond lawful interest. That the defendants have brought actions at law, on the two notes, against the plaintiffs, who prayed for an injunction to stay the suits at law, and for a discovery of the usury charged in the bill, and for relief generally.

The defendants demurred to the bill, 1. Because the bill sought a discovery, from the defendants, of certain usurious transactions charged, and to be relieved against the notes, without offering to pay what appeared, by the bill, to be due for principal and legal interest.

2. That the bill seeks a discovery of matters which, if true, would subject the defendants to a forfeiture of the money due for principal and legal interest.

3. That the bill was informal, in not showing that the court had jurisdiction, or that the discovery was necessary, or useful, to the defendants, for their defence against the suits at law.

4. That the bill contained no equity, &c.

Riggs, in support of the demurrer.

T. A. Emmet, contra.

THE CHANCELLOR. This bill must be dismissed, on the ground that the plaintiffs do not tender the sum really borrowed, with the lawful interest. This court will not aid a plea of usury, at law, by compelling a discovery, unless the

debtor will first do what is equitable, on his part. The case of *Rogers v. Rathbun** is in point; and the fourth section of the statute against usury, requiring a discovery in certain cases, does not apply to a case like the present.

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DENTON
v.
DENTON.

* *Ante*, p. 368.

Bill dismissed, with costs.



DENTON against DENTON.

June 22d.

On application for a writ of *ne exeat republica*, by a wife against her husband, pending a suit for *alimony*, &c., her affidavit is admissible, the proceeding being *ex parte*, and the wife, in that respect, considered as independent of her husband.

A writ of *ne exeat* may be granted prior to any decree for alimony.

And the court, in marking the writ, will exercise a sound discretion, under the special circumstances of the case, having due regard to the rank of the parties, and property of the husband, so as to prevent oppression or extortion.

WELLS, in behalf of the defendant, moved that so much of the order of the 23d *February* last, in this cause,† as directs † *Ante*, p. 364. the issuing of a writ of *ne exeat*, be discharged; and that the bond given in pursuance thereof be given up to be cancelled; and that the defendant have leave to depart from this state, either unconditionally, or upon giving security to return within some given time.

The motion was accompanied with an affidavit of the defendant, denying any intention, before or at any time of the order aforesaid, of leaving the *United States* for *Europe*; and that all allegations to the contrary were untrue. That it was, however, now necessary for him to go to *Europe*, on his private business; and that his intention (if permitted to depart) is to return as soon as his business is finished; and that he has no intention, permanently, to reside out of this state;

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DENTONv.DENTON.

that the affidavits, on which the order was made, were, in other respects, untrue.

In support of the motion it was urged :

1. That the evidence was incompetent, on which the order was granted, being founded on the affidavit of the plaintiff, the wife of the defendant, and which was held to be inadmissible in *Sedgwick v. Watkins*; (1 *Ves.* jun. 49;) and on the affidavit of *B. Tucker*, stating merely the information of a third person, that the defendant intended to depart the state.

2. That admitting the evidence to be competent, it was not sufficient, inasmuch as it was not stated that the defendant intended to leave the state, *with intent* to avoid the decree of this court, touching the claim for alimony, and as no alimony had, as yet, been decreed.

Colden, contra.

THE CHANCELLOR. As the application for a *ne exeat* is *ex parte*, and as the wife is permitted to sue her husband in this court, her affidavit, as plaintiff, is admissible, on the same ground as that of any other plaintiff; and process of injunction, and a *ne exeat*, are, according to the usual course and practice of the court, obtained on the oath of the party. The case of *Sedgwick v. Watkins*, does not appear to be founded on just principles. For the purpose of carrying on this suit, the wife is considered as independent of her husband, and she ought to be permitted to enjoy the rights of a party. In the case of *Shaftoe v. Shaftoe*, (7 *Ves.* 171,) the application for a *ne exeat* was made on the oath of the wife, and no objection was taken ; and the Lord Chancellor proceeded to consider the merits of the motion, on the strength of her affidavit. The case in 1 *Vesey*, is, therefore, to be considered as virtually overruled. The case of *Shaftoe v. Shaftoe* is analogous in another respect, as the motion for a *ne exeat* was there made prior to any decree of alimony,

and was founded on the information and belief of the wife.

The great difficulty in these applications, when a suit is pending for alimony, is, that the right to alimony, and the amount of it, is uncertain ; and there is no certain sum for which to mark the writ. This court has always expressed an inclination to interfere in favour of the wife, if that difficulty could be surmounted. Lord *Loughborough* said he would grant the writ, if he could find a precedent ; and Lord *Hardwicke* said, the *ne exeat* had been granted in this single case of alimony, out of compassion to the wife. (7 *Ves.* 173. *Dawson v. Dawson*, 1 *Ves.* jun. 94. *Coglar v. Coglar*, 2 *Atk.* 210. *Anon. Haffey v. Haffey*, 14 *Ves.* 261.) It does not appear to me that the difficulty of fixing on a sum is, absolutely, insurmountable. Courts of law always surmount it, when the writ is marked for bail in actions founded on torts. The amount of alimony will have a material reference to the rank of the parties, and the property of the husband. The case will always be governed by a sound discretion, arising out of its special circumstances ; and the court will take care that the writ be not used for oppression or extortion. Under this limitation, the process, in cases like this, when the intended departure of the husband is clearly made out, appears to me to be essential to justice.

I shall, in this case, allow the defendant to depart, on giving security in 10,000 dollars to abide the decree of the court, or to return within one year after such decree, so as to be amenable to the process of the court.

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DENTON
v.
DENTON.

Rule accordingly.

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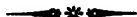
EASTBURN
v.
KIRK.

*SILLS, Administrator, against BROWN AND OTHERS.**June 23d.*

On a rehearing, the party that complains of the decree, and seeks to have it corrected, is entitled to open and close the argument.

ON a rehearing of this cause, a question arose as to which party was entitled to open the argument; whether it was the plaintiff in the suit, or the party, whoever it was, that objected to the decree, and applied for a rehearing.

THE CHANCELLOR. The party that complains of the decree, in whole or in part, and seeks to have it corrected, is entitled to open and close the argument.

*June 23d.**EASTBURN & DOWNES against KIRK.*

Affidavits, *ex parte*, cannot be read in opposition to a motion made, on the coming in of the answer, to dissolve an injunction restraining one copartner from using the copartnership name, or doing any act relative to the partnership concern, or in support of the allegations in the bill.

The admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in *waste*, or in cases where irreparable mischief might ensue.

ON the coming in of the answer, in this cause, a motion was made, by the defendant, to dissolve an injunction restraining the defendant, who was a copartner with the plaintiffs, as booksellers, in the city of New-York, from using the copartnership name, or doing any act whatever on account of the copartnership concern.

T. A. Emmet, in support of the motion.

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Harrison and Wells, contra.

EASTBURN
v.
KIRK.

The counsel, in opposition to the motion, and in support of the allegations in the bill, offered to read certain affidavits of witnesses taken *ex parte*; and to show that the affidavits were admissible in such cases, they cited *Gibbs v. Cole*, 3 P. Wms. 255. *Strathmore v. Bowe*, 2 Bro. 89. S. C. *Dickens*, 673. 1 Ves. jun. 427. *Isaac v. Humpage*, 3 Bro. 463. S. C. *Langston v. Boylston*, 2 Ves. jun. 101. *Cooper's Eq. Treatise*, 154.

On the other side, to resist the introduction of the affidavits, was cited *Berkeley v. Brymer*, 9 Ves. 355.

THE CHANCELLOR. The general rule is against the admission of affidavits in these cases, and the instances in which they have been admitted are special, and exceptions to the general rule. Lord Kenyon, when Master of the Rolls, appears to have doubted the correctness of the practice in any case. They have been admitted in cases of *waste*, and in cases analogous, resting on the same principle, and where irreparable mischief might ensue; and I am aware that partnership cases have been brought within this rule. In one of the cases cited, (2 Bro. 89.,) the affidavits sought to be read against the answer, were the original affidavits on which the injunction to stay waste had been founded, and which the defendant must have had an opportunity to have seen before his answer. In this case, the injunction was granted upon the filing of the bill, and the answer meets the charges; but if these affidavits are to be admitted, the defendant, on whom they must operate as a surprise, can have no opportunity to meet them; for it is well understood in all the cases, that affidavits cannot be admitted in support of the answer in this stage of the cause; and the defendant might be condemned, upon the strength of

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 v.
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these affidavits, to a suspension of the exercise of his rights as a partner, until the hearing, without any opportunity or means of vindicating himself. This case does not strike me as very analogous to the case of waste. The injunction, here, is not to restrain the defendant from committing waste, or doing a positive wrong, but from the exercise of all his rights as partner, from the apprehension that he *may* abuse them. The allegation of previous abuse is made, on one side, by the bill, and denied on the other, by the answer; and if the answer be full, and a denial of all equity, and of every *gravamen* in the bill, it must, upon the present motion, be taken for true. If the injunction is dissolved, the defendant may, undoubtedly, abuse his rights as a partner, to the injury of his copartners; but the case does not seem to contemplate the occurrence of mischief which the law would deem irreparable, and future abuse may be the ground for further application. In the case from 9 *Vesey*, the Chancellor refused affidavits to support an injunction to restrain the negotiation of a bill. To admit the affidavits, in this case, would be to authorize their admission in every other case, and would go to destroy the general rule. The motion for their admission must be denied.(a)

N. B. The motion to dissolve the injunction was afterwards granted, on the ground that the answer was a full denial of the equity of the bill.

(a) Vide *Peacock v. Peacock*, (16 *Vesey*, 49,) where affidavits were admitted after answer, and in support of a motion for an injunction, in a co-partnership case.

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GILL

v.

LYON.

June 27th.

GILL against LYON AND OTHERS.

LYON AND OTHERS against GILL & WILLSON.

A purchaser of a part of lands mortgaged, from the mortgagor, is not bound to contribute ratably, with a purchaser of the equity of redemption, under a judgment subsequently obtained, towards the discharge of the mortgage ; unless the residue of the mortgaged premises prove insufficient to extinguish the debt.

THE following are the material facts in this case :

On the 9th of July, 1806, *Benjamin Willson* (defendant) sold and conveyed to *John Wells*, (defendant,) 163 acres of land, in *Oxford*, in the county of *Chenango*, and, at the same time, took a mortgage from *Wells*, to secure the payment of the purchase money, and which was duly registered on the day of its date. On the 21st of May, 1807, *William W. Rodman* and others, obtained a judgment in the supreme court against *Wells* and one *Amos Rood*. *Robert Cheeseborough* and *William Cairns* also obtained judgment in the same court against *Wells* and *Rood*, both judgments being docketed on the same day, and executions issued at the same time. *R. Cheeseborough* also obtained a judgment, in the same court, at the same time, against the same defendants, and issued his execution thereon. On the 7th of November, 1807, the plaintiff, and *J. Gill*, *M. Gill*, and *R. Gill*, entered up judgment, in the same court, by confession, on a bond and warrant of attorney, against *Wells*, on which an execution issued. The land was sold by the sheriff, under the above judgments, for 1,825 dollars, and conveyed to the plaintiff, as the highest bidder, the 18th of February, 1809.

Wells, after the purchase of *Willson*, and the mortgage, and before any of the above judgments were obtained, sold

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LYON.

parts of the mortgaged premises to *David Lyon* and others, (defendants.) The bill of the plaintiff further stated, that *Wilson* was proceeding to foreclose his mortgage, by advertising all the lands covered by it, under the power contained in the mortgage, pursuant to the statute; and that *Lyon*, and the other purchasers from the mortgagor, had refused to contribute with the plaintiff, who had purchased under the judgments, towards paying off what might be due on the mortgage. *Lyon*, and the others, in their answers, alleged, that they paid *Wells* the full value of the lands so purchased by them, and the deeds contained covenants that the same were free of all encumbrances, &c.; that the plaintiff knew of the purchases by them, and of the registry of the deeds, before he made the purchase at the sheriff's sale; and that *Wells* was insolvent, &c.

It is unnecessary to state more of the pleadings and proofs in the cause. The question was, whether the purchasers under *Wells*, the mortgagor, prior to the judgments, were bound to contribute ratably, with the purchaser under the judgments, to the discharge of the mortgage, and to pay costs, &c.

Henry and *Emmet*, for the plaintiff, *Gill*, the purchaser under the judgments, cited 5 *Viner's Abr.* tit. *Contribution, passim.*

Baldwin, contra, for *Lyons* and the other purchasers under *Wells*, cited 2 *Atk.* 446. 4 *Johns. Rep.* 216.

THE CHANCELLOR. The mortgage ought, justly, to be borne by the lands purchased by *Gill*, if sufficient to satisfy it; and *Lyons* and the other purchasers from the mortgagor, prior to the judgments, are not bound in equity to bear a ratable proportion of the mortgage debt, unless the residue of the mortgaged premises shall not be sufficient to extinguish it. The doctrine of contribution does not apply as between

Lyons and the other purchasers from *Wells*, on the one part, and *Gill* on the other, because their equity is not equal. *Lyons*, and the others, purchased for the full value, and under a covenant from *Wells*, that they should hold their lands free of encumbrances ; and *Gill* afterwards purchased only the equity of redemption remaining in *Wells*, and he made it with knowledge of the conveyances to *Lyons* and others, and he has, therefore, no just claim to contribution. He purchased the remaining right of *Wells*, and no more ; and *Wells*, if he had extinguished the mortgage, would have had no claim for contribution against his own vendee. The case is too plain to need much illustration, and I shall, accordingly, decree, that the portion of the mortgaged premises purchased by *Lyons*, and others, prior to the purchase of the residue by *Gill*, be not sold until the residue shall be found insufficient for the payment of the mortgage debt ; and that their lands shall only be chargeable with the balance due to *Willson*, after the residue of the mortgaged premises shall have been exhausted. And, in order that *Willson* may deal justly with his mortgage, as between the several purchasers, I shall further decree, that he be restrained from selling the portions of the mortgaged premises purchased by *Lyons*, and others, prior to the purchase by *Gill*, until he shall have disposed of the residue of the mortgaged premises, and until those purchasers shall have refused to redeem their portions of the premises, after thirty days' notice, to their solicitor, of the insufficiency of the residue of the mortgaged premises to satisfy the mortgage and costs thereon ; and that *Gill* pay to the plaintiffs, in the suit in which he is a defendant, their costs, to be taxed.

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GILL
v.
LYON.

Decree accordingly. (a)

(a) *Vide ante*, p. 425.

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 METHODIST
EPIS.CHURCH
v.
JAQUES.

June 27th.

*The Trustees of the METHODIST EPISCOPAL CHURCH, in
the city of New-York, and others, against J. D. JAQUES,
R. JAQUES, and H. CRUGER.*

Where a deed of marriage settlement was executed in the presence of witnesses, and laid on the table, and the marriage took place immediately thereafter, in the presence of all the parties; and the deed, without any other or more formal delivery, was taken by the wife, the *cestuy que trust*, and kept in her possession until her death; this was held, under the circumstances, to be a good and valid deed.

A husband is accountable for the personal estate of the wife, secured to her separate use by a deed of marriage settlement, and which has come into his hands during the coverture, but not for *interest* on moneys he may have received for debts due to her. The husband is also accountable for the rents and profits of the wife's real estate, received by him; and lands purchased by him with the moneys of the wife, are deemed to be sold, in *trust*, for her, though purchased in his own name; and a third person, to whom the husband had conveyed an estate so purchased, with notice of the manner of his acquiring it, was held to be chargeable with the trust; but the trustee is to be allowed for any beneficial and permanent improvements made by him on the estate.

Where, by a marriage settlement, the whole real and personal estate of the wife is secured to her separate use, the husband is, notwithstanding, bound to maintain his wife and family during the coverture, and cannot make the expenses a charge on her separate estate; and the consent, or agreement, of the wife, during coverture, that the expenses should be borne by her separate estate, is null and void.

But the husband is entitled to an allowance for moneys expended in necessary reparations of the wife's separate estate, and for any specific appropriation of her property, with her assent or direction; for her benefit, (not being for the ordinary maintenance of her or his family.)

THE bill was for an account of the real and personal estate of *Mary Jaques*, deceased, late the wife of the defendant, *J. D. Jaques*, and who was formerly the wife of *William Alexander*, deceased. It stated, that *Mary Jaques*, at the time of her intermarriage with the defendant, *J. D. Jaques*, was seized and possessed of a large real and personal estate, particularly mentioned in the bill; that, in contemplation of the marriage about to take place between her and *J. D. Ja-*

ques, a deed of marriage settlement was made and entered into, between *Mary*, of the first part, *John D. Jaques*, of the second part, and *H. Cruger*, of the third part, dated the 25th of September, 1805, by which the said *Mary* conveyed all her estate, real and personal, to the defendant, *Cruger*, to the use of the said *Mary* until the marriage should take place, and, from and after the marriage, to the use of such persons, and for such estates, as she, with the concurrence of her intended husband, should, by deed, attested by two witnesses, or by her last will and testament, limit and appoint ; and, until such appointment, to the use of *H. Cruger*, and his heirs, during the life of the said *Mary*, to enable her to take the profits thereof, free from the control of her husband, and at her absolute disposal ; that, immediately after the execution of the deed, the marriage took place between the parties. The bill alleged that, after the intermarriage, *J. D. Jaques*, during the lifetime of his wife, by artful contrivances, possessed himself of her personal estate, and of the rents and profits of her real estate, and applied the same to his own use, changing the securities for money, and taking new securities in his own name ; and appropriated the money belonging to his wife, in purchasing real estate, the titles to which he took in his own name, and claimed them as his own ; that, among the securities so held by the said *Mary*, was a bond of one *Heyl*, for a large sum, and a mortgage of two leasehold, and one freehold, estate ; which securities *J. D. Jaques* having got into his possession, proceeded, in his own name, and procured a decree for the sale of the mortgaged premises ; that he sold one of the leasehold estates to a third person, for 1,980 dollars and purchased in the other for 1,510 dollars, and conveyed it to his brother, *Robert Jaques*, the defendant ; and that he also purchased in the freehold estate, and took a deed in his own name ; which two last estates the plaintiffs claim as part of the estate of *Mary Jaques*, having been paid for out of her personal estate ; and that, before the sale of the mort-

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1815. gaged premises, the defendant, *J. D. Jaques*, received the rents and profits.

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That *Mary Jaques*, intending to execute the power reserved to her by the deed of settlement, did, with the concurrence of her husband, by deed, dated the 12th of September, 1812, convey all her real estates to the defendant, *Robert Jaques*, in fee, upon trust, that, after her decease, he should sell the same, and out of the proceeds, after paying the expenses, should dispose of the surplus as follows: to wit, one third to the trustees of the *Methodist Episcopal Church*; one third to the children of *Thomas Brown*, and his wife, in equal shares; and the remaining third to the defendant, *J. D. Jaques*. That after the execution of that deed, *Mary Jaques*, on the 25th of September, 1812, made her last will and testament, by which she gave several specific legacies to the plaintiffs; the children of *Thomas Brown* and his wife, to *Jane Brown*, and others; and all the residue of her estate she gave, the one third thereof to the plaintiffs, the trustees of the *Methodist Episcopal Church*; one third thereof to the plaintiffs, the children of the said *Thomas Brown* and wife; and one third to the defendant, *J. D. Jaques*; and appointed *Paul Hicks* and *Thomas Brown*, plaintiffs, and *John D. Jaques*, defendant, executors of her will. That after the will was duly proved, and the specific legacies paid and delivered, the plaintiffs, *Hicks* and *Brown*, executors, applied to *J. D. Jaques*, the co-executor, who had the custody of the papers, securities, and personal effects of the testatrix, to exhibit the same to them, in order that an inventory might be duly made; but the defendant, *J. D. Jaques*, refused to do so, unless the plaintiffs would first agree to pay him a demand of about 12,000 dollars, which he said he had paid for maintaining the said *Mary Jaques*, her horses and carriages, &c.

The bill set forth the particulars of the residuary personal estate of the testatrix, as far as it had come to the knowledge of the plaintiffs; and prayed an account of the same, and a

discovery of what moneys, or securities for money, belonging to *Mary Jaques* at the time of her marriage, had come to the hands of the defendant, *J. D. Jaques*, and how he had disposed of the same ; and also of the rents and profits of the real estate received by him ; and that the title-deeds might be brought into court ; that he might be compelled to surrender the trust of the real estate, or give security for the due performance thereof ; that a receiver of the estates may be appointed, and the defendants enjoined from disposing of any part thereof ; and for general relief, &c.

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The defendants, in their answers, admitted that *Mary Jaques*, before, and at the time of her intermarriage with *J. D. Jaques*, was seized of certain real estates, which they mentioned ; and was possessed of personal property, consisting of slaves, household furniture, horses, carriages, moneys, securities for money, &c., amounting to about twenty-two thousand dollars. That the deed of settlement, of the 25th of September, 1805, was signed and sealed, but that it was never delivered, and, therefore, they denied its validity. They admitted the mortgage of *Heyl*, and a judgment against him for 2,772 dollars ; and that the mortgage and judgment were put into the hands of *J. D. Jaques*, by *Mary Jaques*, to collect ; and that he was let into the receipt of the rents and profits of the mortgaged premises ; that *J. D. Jaques* stated and settled an account with *Heyl*, the balance of which, on the 1st of July, 1806, was 8,026 dollars and 97 cents. The defendants, also, admitted the sale of the mortgaged premises, and the purchase and conveyances, as stated in the bill, setting forth the particulars of the transaction ; that *Robert Jaques* had notice, at the time *J. D. Jaques* conveyed to him the leasehold lot in *Murray-street*, of the manner in which *J. D. Jaques* obtained title to the leasehold premises under the mortgage ; and that the lease of the lot in *Murray-street* was renewed, in 1812, for 42 years, and assigned to *Robert Jaques* ; and that the mortgaged premises purchased in by *J. D. Jaques*, at the master's sale, were paid for by

1815. deducting so much from the sum reported due by the master; and that *J. D. Jaques* informed *Mary*, his wife, that he had received the said money from *Heyl*, or property equivalent, with which she appeared satisfied. That *J. D. Jaques* never paid or accounted to her for the money or property so received and obtained by him. The defendant, *J. D. Jaques*, admitted that he received 808 dollars and 71 cents, for rents and profits of the mortgaged premises, before the sale, which he had not paid over. That his marriage was kept secret 11 months after it took place, during which time his wife transacted her business by her former name, *Mary Alexander*; and he set forth further, the particulars of his account of expenses for maintaining her, her horses, &c., during her life, and for family expenses, &c.

The above statement is thought sufficient to a clear understanding of the decision of the court, without entering into a detail of the proofs taken in the cause.

Riggs, for the plaintiffs.

T. A. Emmet, and *Harris*, for the defendants.

The counsel, on both sides, went into a particular examination of the proofs in the cause, and the accounts exhibited. The following are the material points insisted on in the argument.

For the plaintiffs, it was contended, 1. That the deed of settlement was valid, and secured to *Mary Jaques* the whole of the real and personal estate; that the deed was frequently recognised by *J. D. Jaques*, during the coverture, and was referred to in her will, of which he was executor, and had acted as such. Though not delivered into the hands of the trustee, but kept by the *cestuy que trust*, it was, nevertheless, a good deed. (9 *Ves. jun.* 380.)

2. That a husband is bound to maintain his wife, and

that the marriage settlement made no alteration in the rule of law, in that respect ; the defendant, *J. D. Jaques*, could not, therefore, be allowed to deduct the charges of her maintenance, or the family expenses, from the sums received out of her personal property, and for which he was accountable. (2 *Atk.* 513.) The wife could make no contract with her husband, in this respect, nor vest her separate property in him. (2 *Ves.* jun. 488. 4 *Bro. C. C.* 409.)

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3. That the purchases of the mortgaged premises were made with the money of *Mary Jaques*, and both *J. D. Jaques* and *Robert Jaques* must, in the whole of this transaction, be regarded as trustees for those entitled under her will. The surrender of the old lease, and taking a new one, did not vary the rights of the parties, but the second lessee stands on the same footing as the first. (2 *Atk.* 74. *Sugden's Law of Vend.* 444. 427. 9 *Vesey*, jun. 375.)

For the defendants, it was argued, that if the bill could be sustained, an account must be taken before a master ; and the only object for the court, at this time, would be to settle a few principles, for the guidance of the master in taking the account. The point, as to the purchase of the leasehold, and renewal of the lease, ought to be left on the equity reserved, on the coming in of the report. The principal question was, what allowances were to be made to *J. D. Jaques* for the maintenance of his wife, and the family expenses. But if the settlement deed was not valid, as they contended it was not, then the bill must be dismissed. There was no pretence that the deed was ever delivered. There was no proof of a delivery. In *Chamberlain v. Stanton*, (Cro. Eliz. 122.,) where a deed was signed and sealed by the defendant, and laid on a table, and the plaintiff, afterwards, came and took it up, the court held it was not the defendant's deed, there being no formal delivery of it.

That *J. D. Jaques* cannot be a trustee of the property purchased by him. *Robert Jaques* was a fair purchaser, and cannot be held to be a trustee. But on the main point,

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1815. how far the defendant, *J. D. Jaques*, is to be allowed for the expenses of maintaining his wife and family, the evidence shows conclusively, that it was understood, and agreed by *Mrs. Jaques*, that those expenses were to be borne by her ; and her estate ought, therefore, to be made liable for them. At any rate, a husband is not liable to pay *interest* on the amount of her estate received by him. (2 *Vesey*, jun. 698. 2 *P. Wms.* 82, 83.)

**THE CHANCELLOR.** This case having been brought to a hearing on the pleadings and proofs, it seemed to be a conceded point, that there must be a reference to a master to take and state an account between the parties ; and the object of the discussion was to ascertain and settle the principles upon which the account was to be taken.

1. I am of opinion, in the first place, that the marriage settlement of the 25th of September, 1805, is to be considered as valid and binding. It was executed by *Mrs. Jaques*, prior to the marriage, with the usual solemnities, and laid upon the table, in the presence of all the parties to it. It was executed in reference to the marriage, which took place immediately thereafter, and while the deed so remained upon the table. The deed, under these circumstances, is to be considered as duly consummated ; and it would operate as a fraud upon the wife, and be repugnant to one of the considerations of the marriage contract, if the husband could be permitted to set aside the deed, for the want of some technical formality in the delivery. The delivery was here sufficient in judgment of law, and the taking of the deed, afterwards, by the wife, into her possession, is to be considered as done with the assent of the trustee, and for safe-keeping, and could not impair its validity. The husband, during the coverture, recognised the deed by being a party to the conveyance to *Robert Jaques*, made in pursuance of its provisions ; and, since the death of his wife, he has recognised it by proving and acting under her will, which re-

fers to that settlement, and declares the will to be made in pursuance of it.

2. The deed of settlement being valid, and to be supported in this court, the defendant, *John D. Jaques*, is to account for the whole personal estate of his wife which may have come to his possession. But, considering the confidential nature of the marriage connexion, and the agency of the estate, which usually and almost necessarily results from it, it would be too rigorous to charge the husband with interest on the moneys which may, from time to time, have been received. Some of the cases go so far as not to require the husband to account further than for the principal of the wife's separate personal estate, in cases where moneys have been received, and not to account for the interest which he may have received on the debts due to her. (*Powell v. Hawkey & Cox*, 2 *P. Wms.* 82. *Squire v. Dean*, 4 *Bro.* 326. *Smith v. Lord Camelot*, 2 *Vesey*, jun. 698.) This liberal rule I am willing to adopt in this case, especially as Mrs. *Jaques* was very indulgent to her husband as to the management of her estate, without making complaint either to her trustee or to this court. I shall presume, that such receipts of interest (if any) were expended for the benefit or accommodation of the wife, and shall not impose on the husband the burden of duly accounting for every particular item of such expenditure.

3. The defendant, *J. D. Jaques*, is to account for all the rents and profits which he may have received of her real estate, including the leasehold estate, and the freehold estate purchased in by him, under the operation of *Heyl's* mortgage. These lands were purchased by him with the moneys of his wife, and the purchases, consequently, enured to her benefit as a resulting trust. The defendant, *Robert Jaques*, is, also, to account for the rents and profits of one of these estates, purchased by him of *J. D. Jaques*, and unpaid for. He appears to be justly chargeable with notice of the trust

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1815. when he made the purchase ; and, consequently, the trust went with the purchase. But, under the circumstances of the case, it would be reasonable, and I direct that either trustee be credited, by the master, in taking the account, with any beneficial and permanent improvements made by him upon the trust estate.

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4. No allowances are to be made to the defendant, *J. D. Jaques*, for the maintenance of his wife and family, during the coverture, that being a duty chargeable upon him as husband, and in no respect chargeable upon the wife's separate estate. Such an allowance would be a fraud upon the marriage settlement, by which it was expressly declared, that the husband was not to have any right, or interest, in law or equity, in or to any part of her estate, but the same was to be subject only to such uses as she should declare by deed, and to her separate and only use and benefit. The estate was not to be subject to his control or engagements ; and, to render it chargeable with the maintenance of her or his family, would be in violation of the settlement, and defeat or impair its provisions. I have not, therefore, paid any attention to the parol proof of the confessions of the wife during the coverture, as to any agreement that the family expenses were to be borne by her separate estate. Such confessions are in contradiction to the solemn contract of the parties, by deed, when they were separately capable of making such a contract ; they must be viewed with the utmost jealousy, as made under improper influence, and cannot be permitted to be set up by the husband to impair the rights of his wife under the settlement. The utmost that I can do in this case is, to allow the husband to be credited with any necessary reparations bestowed by him on any part of her estate ; and with any particular specific appropriation of her property, (not being for the ordinary maintenance of her or his family,) which may have been made by her special assent and direction, in the given case, and, apparently, for her benefit. In one case (4 Bro. 409.) an allowance was

made to the husband, out of the wife's separate estate, for extra expenses in her maintenance; but the burden was there peculiar and extraordinary, on account of mental derangement.

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5. It would be proper, in this case, and for the benefit of all the parties in interest, that the real estate left by Mrs. Jaques, including the lands so held in trust for her, should be sold, and the proceeds brought into court, to the end that the same may be distributed according to the directions in the deed and will of Mrs. Jaques.

Let a reference be, therefore, made to a master, to take and state an account, subject to the directions here given; and let an order be entered for the sale of the real estate, &c.

Decretal order accordingly.(a)

(a) S. C. ante, p. 65.



*SMITH, an infant, by his next friend, against BRUSH*

*June 27th.*

**AND OTHERS.**

Where the facts charged in a bill are fully denied by the answer, there can be no decree against the answer, on the evidence of a single witness only, without corroborating circumstances to supply the place of a second witness. And where publication had passed in a cause, without any witnesses being examined on either side, the court refused, especially after the lapse of more than two years from the time of filing the bill, to open the rule for publication, on the affidavit of the plaintiff of the discovery of a witness who would prove a material fact in the cause, denied in the answer. Nor would the court, under the circumstances, award a *feigned issue* in the cause, that being a measure of sound discretion.

THE bill, in this cause, was filed *January 7th, 1812.* The answer of *Brush* was put in *July 29th, 1812.* In

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*March, 1813*, a rule was entered to produce witnesses in the cause; and, in *January, 1815*, publication passed, no witnesses having been examined on either side.

The facts stated in the bill were, that *Thomas Gibbons*, on the 22d of *July, 1804*, gave to *John Smith*, the plaintiff, a note for 5,000 dollars, payable in five years, who endorsed it to *Robert Smith, jun.*, who, in *April, 1809*, gave the note to *Theron Rudd*, as security, who, with the assent of *Robert Smith, jun.*, delivered the note to the defendant, *Brush*. That the note was given by *Gibbons* for the benefit of the plaintiff, his natural son, which was the consideration; that *Brush* brought an action against *Gibbons*, at law, on the note, on the trial of which *Robert Smith, jun.* was a witness, and proved the facts set forth in the bill, as to the note; and on which trial a verdict was found for the plaintiff. That *Brush*, when he took the note, knew the original consideration of the note, and the trust under which it was received; and that *Brush* was not a *bona fide* holder, not having paid a full consideration for the note; that *Gibbons* being willing that the amount of the verdict should be applied under the direction of the court, had paid the money into court; and the bill prayed, that the money might be placed at interest for the benefit of the plaintiff; and that the defendant, *Brush*, might be enjoined from proceeding at law on his judgment, and for relief generally; an injunction was issued accordingly.

*Brush*, in his answer, averred, that he paid a good and valuable consideration for the note, which he set forth, and denied all knowledge, at the time he received the note, of the original consideration, or purpose, for which the note was given, or of any trust or confidence between the original parties; not having heard of any such allegation, until in *November, 1809*.

A motion was now made, on the part of the plaintiff, to open the rule for publication, on an affidavit stating the discovery, yesterday, of a witness, by whom he could prove

that the note was in possession of *Robert Smith, jun.*, after it was due, and that *Smith* offered it as a pledge for money.

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*T. A. Emmett* and *Colden*, in support of the motion.

*Boyd* and *Slosson*, contra.

**THE CHANCELLOR.** The bill charges the defendant, *Brush*, with purchasing the note under a knowledge of the consideration for which it was given, and of the trust under which it was taken by the payee, and deposited with *Robert Smith, jun.*; and it further charges him with not being a *bona fide* holder for a valuable consideration. To this charge the answer states, that the note was purchased in *April or May*, 1809, for a valuable consideration, and the items forming that consideration are particularly mentioned, and amount to 3,550 dollars; that the note was assigned to him by *Robert Smith, jun.*, it being at that time in the hands of *Theron Rudd*; and that, at the time of the assignment, he was not informed of the consideration or purpose for which the note was given, nor of any agreement, trust, or confidence, between the original parties, and that the first knowledge of any of these allegations in the bill, was obtained in *November*, 1809; that the transfer of the note to him was absolute and unconditional, and the same is solely and exclusively his property.

This answer was put in, in *July*, 1812, and the rule to produce witnesses was entered in *March*, 1813, and publication passed in *January* last; and a motion is now made to open the publication, on affidavit of a discovery of a single witness, by whom the plaintiff undertakes to prove that the note was in possession of *Robert Smith, jun.*, after it was due, and that *Smith* offered it as a pledge for money.

The decisive objection to this motion is, that the testimony would not be material if produced. It is a well-settled rule, that there cannot be a decree upon the facts charged in the

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bill and denied in the answer, upon the deposition of a single witness. There must be two witnesses, or concurring circumstances, to supply the place of a second witness, before there can be a decree against the answer. (*Walton v. Hobbs*, 2 *Aik.* 19. *Pember v. Mathers*, 1 *Bro.* 52.) Here are no circumstances stated, or shown, in corroboration of what the newly-discovered witness might prove. The answer is clear and positive, and the defendant, *Brush*, stands upon his right to the judgment at law, as a *bona fide* purchaser, without notice, and for a valuable consideration, of negotiable paper before it was due. It was suggested that the evidence of one witness might justify the awarding of a feigned issue to try the fact of notice, or of a purchase out of time. But that step must rest upon discretion, guided by the special circumstances of the case ; and when we take into consideration the great lapse of time since *Brush* obtained his judgment at law, and put in his answer in this court, during which period the plaintiff has not been able to furnish any proof ; and when we consider further, that the recovery on the note was strongly resisted on the trial at law, on the ground of forgery, I think it would not consist with the exercise of a sound discretion, to harass the defendant with another trial at law, when he is able to rest upon his defence here. I am, accordingly, of opinion, that the motion be denied.

The cause, then, came on to a hearing, and the bill, as to *Brush*, was dismissed, with costs.

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CARTER  
v.  
UNIT. INS. CO.  
June 28th.

CARTER AND MOORE against THE UNITED INSURANCE  
COMPANY OF NEW-YORK.

A bill filed to recover the amount of a total loss on a *policy of insurance*, stating no other ground of equitable relief, than that the policy had been assigned to the plaintiffs by the insurers, in whose name it had been effected, and that the insurers refused to pay, was, on demurrer, dismissed, with costs, the plaintiff having adequate remedy at law.

THE bill was filed by the plaintiffs, as assignees of a policy of insurance, underwritten by the defendants, for *William Titus* and *George Gibbs*, on which the plaintiffs claimed payment for a total loss. The insurance was on 500 barrels of flour from *Newport* to *St. Jago de Cuba*, on board the Spanish brig *Patriota*, which was captured by a *Carthagena* privateer. On the 21st of *December*, 1814, the policy was assigned by *Titus* and *Gibbs* to the plaintiffs, in *trust*, for themselves and other creditors of *Titus* and *Gibbs*. The bill charged that the defendants refused to pay the loss, alleging, among other things, that the plaintiffs had no title to the property insured, which, in fact, belonged to one *J.*, a *Spaniard*, and not to *Titus* and *Gibbs*. The bill prayed that the defendants might answer the matter charged in the bill, and be compelled to pay the plaintiffs the amount insured, as for a total loss.

To this bill the defendants demurred on the following grounds: That it appeared by the bill that the plaintiffs' demand, or cause of action, was properly cognizable in a court of law; as it is not alleged that *Titus* and *Gibbs* refused to let the plaintiffs make use of their names, in a suit at law; or that they are, in any way, hindered from prosecuting at law; or that they stood in need of any discovery to aid them in such action.

1815. *S. Jones, jun., in support of the demurrer.* He cited  
~~~~~ *Marsh. on Ins.* 679. *4 Bro. P. C.* (*Tomlin's edit.*) 436.  
CARTER v. Moseley's Rep. 83. *1 Atk.* 457.
UNIT. INS. CO.

T. A. Emmet, contra.

THE CHANCELLOR. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of *Gibbs* and *Titus*, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the Chancellor, in the analogous case of *Dhegetoft v. The London Assurance Company*, (*Moseley*, 83.) that, at this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. (*3 Bro. P. C.* 525.) The bill, in this case, states no special ground for equitable relief; nor is any discovery sought which requires an answer.

Bill dismissed, with costs.

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BARKER
v.
ELKINS.

June 29th.

Where a defendant, in an action at law, has not used due diligence in making his defence, or in applying to this court for a discovery, to assist his defence, at law, if necessary, he cannot, after a verdict against him, obtain the aid of this court to stay the proceedings at law, or to have a new trial.

THE plaintiff authorized *Michael Connellin*, at *New-Orleans*, to purchase and ship for him a certain quantity of flour and cotton, and to draw on him for payment. *Connellin*, in *March*, 1812, drew bills on the plaintiff, in favour of *Elkins* at 60 days sight, which were accepted by the plaintiff, but, afterwards, protested for non-payment. *Elkins* claimed the amount as holder of the bills. On the return of the protested bills to *New-Orleans*, *Connellin*, who had the flour and cotton in his possession, assigned them over to the defendants, in trust, to pay the bills and other demands, &c. Part of the bills were, afterwards, paid by the plaintiff; and the flour and cotton so assigned were sufficient to pay the balance due. The defendants sold the flour and cotton without crediting the plaintiff with the proceeds; and in *January*, 1813, brought an action at law on the bills against the plaintiff; and, in *April*, 1813, obtained a verdict against him for 5,606 dollars and 48 cents. Pending the suit at law, *Connellin* died insolvent. The plaintiff further charged, in his bill, that he had been deprived of the means of obtaining legal testimony to defend the suit at law; and that the present defendants were insolvent. He prayed for a discovery and account, and an injunction to stay further proceedings on the verdict at law.

It appeared that an injunction had been moved for, on a former bill, for that purpose, a few days previous to the trial at law, and was denied; and that, without dismissing

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the former bill, the present bill, with some slight amendments, was filed, and an injunction allowed by a master, on the plaintiff's bringing the amount of the verdict into court.

Slosson, for the defendants, now moved to dissolve the injunction, on the ground that the first bill had not been dismissed; that an injunction had once been denied; (*3 Atk.* 394. ;) and that no sufficient equity was stated in the bill.

Wells, contra, offered to enter a rule *instanter*, for dismissing the former bill, with costs. The injunction on the first bill, he said, was denied, because the plaintiff did not sufficiently account for his delay, in not applying for it before, or until on the eve of the trial at law. He urged that, if the injunction was not retained, the plaintiff would be remediless, as the plaintiffs in the suit at law were insolvent.

THE CHANCELLOR. The plaintiff should have made his defence at law, by way of payment, or set-off; and he might, perhaps, have called for a discovery in aid of his defence at law. No reason is assigned why he did not call for a discovery, or prepare and defend himself in due season. He has not stated what were the obstacles to a defence at law. A defendant cannot come here for a new trial, when no special ground of fraud or surprise is suggested, and when he neglects, or omits due diligence, and without due excuse, to defend himself in his proper place. This is a fundamental doctrine in this court. (*Le Guen v. Gouverneur & Kemble*, 1 Johns. Cas. 436. *M'Vickar v. Wolcott*, 4 Johns. Rep. 510. *Lansing v. Eddy*, decided ^{* Ante, p. 49.} in this court, June, 1814.* *Smith & Mead v. Lowry*, Oct. ^{+ Ante, p. 320.} *tobr*, 1814.† The principle has been so often declared, that it is useless to enlarge; and, without resting on minor

objections, the injunction cannot be retained on the merits of the case.

Motion granted.(a)

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(a) See *De Lime v. Glassell*, 4 H. & M. 369. *Turpin v. Thomas*, 2 H. & M. 139. S. P.



STOUGHTON against LYNCH.

July 1st.

Where articles of copartnership stipulated, that the *capital* and *profits* of the company should remain in the house, and be employed, during the copartnership, for the benefit of the concern, each party being at liberty to withdraw from the joint funds so much only as was necessary for his private expenses ; it was held that neither party had a right to withdraw from the funds money to purchase plate, household furniture, carriages, horses, &c. but only for family expenses, and the reasonable education of children, &c. If one partner withdraws or uses the partnership funds, in his own private trade or speculations, he must account not only for the *interest* on the moneys so withdrawn, but for the *profits* of that trade.

THIS was a bill for an account between the parties, as partners in trade. The articles of copartnership were dated the 10th of *March*, 1783, both parties then residing in the *United Netherlands*. By these articles, the parties agreed to establish a trading house at *New-York*; and the plaintiff was to proceed to *New-York*, for that purpose, as soon as possible, after the 1st of *May*, ensuing. The partnership was to continue for seven years after the plaintiff's arrival in *New-York*, and then six months after notice of separation. The plaintiff was to be the active partner, or to take the labouring oar, and the profits were to be equally divided. The capital was to be 7,500 pounds sterling, of which the defendant was to furnish 5,000 pounds, and the plaintiff the residue ; and to pay an interest of five per cent. on his deficiency of capital. *The capital and profits to re-*

1815. *main in the house, and be employed for the benefit of the concern, during the partnership, withdrawing such part only as may be necessary for private expenses.* The defendant proposed to establish himself at *Philadelphia*. A fair balance of the books of the firm was to be made, signed, and approved by the parties, annually. Neither party was to do business at *New-York*, on their private account, during the partnership, nor lend any of the capital stock, nor enter into any acceptances, for account of the partnership, without mutual consent, each party doing his best to promote the advantage of the company; the plaintiff was to carry out to *New-York* 1,000 pounds sterling. The partnership was dissolved in *July, 1795.*

The *decretal order* of reference, of the 6th of *July, 1814*, to a master, to take and state an account between the parties, directed the defendant to be charged with *interest* upon all such sums of money as he may have drawn out of the co-partnership funds beyond the amount necessary for his private expenses.

The master, in his *report*, stated, that the defendant claimed, under the head of charges necessary for his private expenses, (1.) 1,200 dollars, for his family expenses at *Bruges*, from the 6th of *October, 1783*, the day on which the plaintiff commenced business at *New-York*, to the 1st of *April, 1784*. (2.) 500 dollars, expenses of removing from *Bruges* to *London*, in *April, 1784*. (3.) 5,000 dollars expenses in *London*, from the 1st of *April, 1784*, to the 1st of *April, 1785*. (4.) 1,500 dollars, for expenses from that day until the defendant's arrival in *New-York*, including the passage. (5.) 5,610 dollars, for plate, harpsichord, carriage and horses, and furnishing a house in *New-York*. (6.) 1,260 dollars, annually for rent of a house in *New York*, from the 1st of *April, 1788*, to the 3d of *July, 1795*. (7.) 1,050 dollars, annually, expenses of educating four children, from 1792 to *July 3d, 1795*. All these charges were disallowed by the master, and exceptions were taken by the defendant.

The points discussed and decided, arose on these exceptions, and for further directions to the master.

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Stoughton
v.
Lynch.

T. A. Emmet, Riggs, D. B. Ogden, and P. J. Munro, for the defendant.

Harrison and Wells, for the plaintiff.

THE CHANCELLOR. The articles of copartnership intended to preserve, in a state of progressive accumulation, the funds of the house; and the clause upon which the question before me has arisen, is to be taken strictly. This is evidently the sense and spirit of the agreement. It is expressly stipulated, that the capital *and profits* of the company were to *remain* in the house, and *to be employed* for the benefit of the concern, during the partnership, with this special exception, that such part *only* was to be withdrawn, as might be *necessary* for *private expenses*. And to show the care with which the parties guarded the funds from being diverted by either of them, it was further stipulated that neither of them was *to do business at New-York on their private account*, nor *lend any of the capital stock*, or enter into acceptances; but each party was *to do his best* to promote the advantage of the company. After reading these articles, it is impossible not to view most of the charges which the defendant wishes to include under the special exception as palpably inadmissible. To consider plate, musical instruments, carriage and horses, and the whole furniture of a house, as coming within the permission granted to the parties to withdraw the funds of the house *only* when *necessary for private expenses*, is, in my judgment, an unreasonable and extravagant pretension. The object of the decretal order, of last *July*, was, not to exempt from interest all those moneys withdrawn that were not supposed to be employed in land speculations. I then observed, that if the funds so withdrawn had been employed in trade, the party

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would have had to account, not merely for interest, but for the profits of that trade ; and we find authority for this in *Brown v. Litton*, (1 P. Wms. 140,) and in *Crawshay v. Collins*, (15 Ves. 218,) where the principle is stated, that if one partner trade alone on a joint stock, he shall divide the profits. The least that I could do, in this case, was to make him pay interest on all moneys withdrawn beyond the private necessity expressed in the contract. The interest of the parties as joint traders, the obvious policy and meaning of the contract, and that good faith which is the animating principle in all mercantile associations, unitedly concur in recommending us to view the claims set up by either party, under the exception, with a jealous and scrupulous eye. Without such a rule of construction, a partnership, like the present, with all its provisions to preserve the funds of the house untouched, might soon languish under the carelessness, or dissipation, or discordant and rival views, of either of the contracting parties.

The parties, then, had in view, that funds were to be withdrawn only when necessary for private expenses ; and when at any time withdrawn, the party must have done it with a view to that necessity. That must have been the purpose for which they were withdrawn. The more safe and regular way would have been, to have stated, in each case, the object of the appropriation, so that each party, at the end of every year, when a fair balance of the books, according to the articles, was to be made, signed, and approved, might have known and judged of the requisite appropriation. But it would, perhaps, be too rigorous to require the production of such an original entry to justify every such appropriation ; and I am willing even to presume, that a fair and reasonable sum, drawn away in each year, was necessary for the private expenses of each individual partner during that year. Beyond this presumption I cannot go. All the European expenses of the defendant are, therefore, to be laid out of the case, because, as I under-

stood from the suggestions of the counsel upon the argument, there was no concurrent, or any thing like cotemporary, appropriations, or drafts, with any presumed reference to those expenses. I am to presume, then, and I do presume and believe, that the defendant never deemed it necessary, at the time, to recur to the permission granted under these articles, to meet and defray those expenses. The idea of including them under this article was an after-thought, arising many years after those expenses had been borne and forgotten.

With respect to the moneys drawn out by the defendant, after his arrival and settlement in this country, (and no moneys were called for by him before,) it may be difficult to estimate the allowance that ought reasonably to be made for necessary private expenses; for *so far*, and no farther, I can presume the moneys diverted by the defendant within any given year, were applied. It ought to be observed, that the inquiry is, not what the defendant ought to have as suitable to his establishment and fortune, but how much we can fairly presume he thought proper to draw out of the funds of this company for that object. If no money was drawn out, in any given year, by the defendant, I am to presume he elected to support his family, for that year, out of *other funds*, and deemed it most advantageous that his portion of the funds of this company (and which was, probably, only a small part of his estate) should continue to be employed in the business of the concern. On this ground, therefore, I cannot presume, and unless the defendant can furnish the proof to the master, I cannot allow, that any part of the funds of the company were withdrawn to meet the interest of the moneys with which he built the house in which he lived. If the defendant was able to build and occupy such a house with other funds, it is impossible to suppose he thought it necessary to curtail his capital in this company, to pay himself for living rent free in his own house. No prudent man would so abuse and misapply his own funds.

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1815. He either withdrew the funds because he wanted them for actual current expenses, or for some purpose unauthorized by his contract. I am, therefore, of opinion, that the charge of rent was properly rejected by the master. The expense of his family, and the reasonable education of the children, may be fairly presumed to have been supported out of funds drawn from the concern within the year ; and the only charge in the master's report, which, I think, was a proper subject of allowance, to a certain extent, was that of the expense of education of the children of the defendant ; the proper sum which the master is to allow for that education, as well as for the other expenses of the family, must depend upon what shall appear to him to be a reasonable allowance to a person of the defendant's rank and business, and under all the circumstances of the case. This allowance, however, for any given year, is, in no case, to exceed the amount of the moneys drawn out by the defendant within that year. Beyond that sum, I have no ground for any presumption and allowance ; and if the defendant made no diversion of the funds of the company in any given year, I shall contend, that he elected to let these particular funds flourish, for that year, in the business of the concern, and to support his family out of other parts of his estate less beneficially employed.

The exceptions are, accordingly, overruled, with costs ; and the master must have further directions, according to this opinion.

Rule accordingly.

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July 3d.

MOSÉS AND OTHERS *against* MURGATROYD,
Administrator, &c.

An administrator, or trustee, who resists a claim, and litigates *bona fide*, from a conviction of duty, and where no intentional default is made to appear, will not, under the circumstances of the case, be charged *personally* with the costs; but they must be paid out of the assets of the intestate.

On a *rehearing* the court refused to alter the decree before given in the cause, (*ante*, p. 119.,) except as to the payment of costs by the administrator. And the court refused to order the costs of the administrator of the mortgagor, on the sale of premises mortgaged *in fee*, to be paid out of the proceeds in this court.

ON a *rehearing* against the decree of the 29th of *August* last, in this cause, (*ante*, p. 119.,) the objections to that decree were, 1. Because it was decreed that the amount of the moneys in the hands of *Charles Wilkes* be paid to the plaintiffs, under their demand, founded on the assignment of the 12th of *February*, 1806, mentioned in the pleadings; whereas those moneys arose out of the proceeds of the cargo of the ship *Emperor*, under the two assignments of the 20th of *December*, 1805, and the 12th of *February*, 1806.

2. Because it was decreed that the defendants should pay costs.

It was, also, urged, on the rehearing, that the costs of the administrator, relative to *Lawrence's* mortgage, ought first to be paid out of the assets resulting from the mortgage, and the residue only be distributed.

T. A. Emmet and Wells, for the defendants.

Harrison and Hoffman, contra.

THE CHANCELLOR. It appears from the pleadings and proofs, that *S. G. Ogden* made three assignments of pro-

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party to *Samuel Murgatroyd*. The first assignment was on the 20th of December, 1805. That assignment has not been made an exhibit, or an object of proof, for the defendant seems not to have placed any reliance upon it as a matter of defence ; and, therefore, the precise terms of it do not appear. But, from the incidental notice taken of it in the cause, it appears to have been an assignment of a quantity of coffee on board the ship *Emperor*, and arising out of some old debt due to *Ogden* from the government of *Hayti*. This first assignment was not made by *Ogden*, nor accepted by *Murgatroyd*, as a special security for any particular debt ; but was intended as a general security for advances and responsibilities made or incurred by *Murgatroyd* on account of *Ogden*. The next assignment was made on the 20th of February, 1806 ; and though, like the former, it was general in its terms, yet it has been shown and decreed to have been made and accepted as a special security for *Murgatroyd's* endorsement of the notes stated in the bill. This assignment was of 100,000 pounds of coffee, or other goods of equal value, (or to the value of 20,000 dollars,) on board of the said ship, being the returns of the outward cargo. The third assignment was of the freight of the ship ; but as no part of that freight ever came to the possession of the assignee, it becomes of no consequence in the present case.

The ship, with her cargo, arrived at *New-York* ; and it has been ascertained, under an arbitration acceded to by the parties, that of the proceeds of that cargo, consisting of coffee, cotton, and sugar, the sum of 16,270 dollars and 50 cents came to the hands of the defendant, under the two assignments, without distinguishing whether those proceeds came to hand under the one or the other assignment, though it admitted that a considerable part of the coffee was to be placed to the account of the second assignment. After deducting from those proceeds the amount which had been paid on two of the notes mentioned in the

pleadings, the sum of 11,150 dollars and 50 cents was placed in the hands of Mr. *Wilkes*, to abide the decree in this suit.

Upon a consideration of the case, under all its circumstances, it appears to me that the administrator cannot be permitted to protect part of the coffee against the operation of the second assignment; and that the whole amount of the moneys in the hands of Mr. *Wilkes* was justly applied, by the decree, to the payment of the notes mentioned in the bill.

The amount of coffee claimed, in this case, falls short of the quantity specified in the second assignment; and it does not appear that the coffee, laden on board, had any distinguishing mark to designate from what particular source it arose; and the proceeds of it seem never to have been discriminated as belonging to different objects, either by the assignee or his administrator. The coffee must have been, originally, confounded in one entire parcel, and as yielding one entire sum, to be appropriated, generally, to the indemnity of the intestate, for his engagements on behalf of *Ogden*. This is the necessary conclusion to be drawn from the case, as the first assignment is not even made an exhibit in the cause; and the distinction now set up, on the rehearing, appears not to have been made by the intestate, nor relied on as a material point of defence by the defendant. The first assignment created no special trust in the intestate. It was made for his indemnity at large against existing and future advances and responsibilities for *Ogden*; and when the intestate accepted of a second assignment of coffee, on board of the same ship, to a precise amount, and to meet the demands of particular creditors of *Ogden*, a slight variation in the description of the source from whence the coffee proceeded seems not to be sufficient to justify the assignee in disregarding his trust. The safer and better rule is to preclude this recent pretension as dangerous to the fidelity and security of the trust; and which pretension the intestate, and

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his representative, may be considered as having successively waived by their own conduct. In construing the instruments, we are to look to the rights of the parties, as they stood when the second assignment was made and accepted. The two assignments were the acts of the same parties ; and as the second charged the intestate with a special trust, we ought, if possible, to give it full effect, and, if necessary, to make all the coffee on board subservient to that trust, to the specified amount, without inquiring how much proceeded from one source, and how much from another. That addition cannot well be considered, under the peculiar circumstances of this case, as an essential part of the description. The great object and substance of the contract was coffee to a certain amount. The intestate accepted, and assumed to apply to the discharge of particular debts, 100,000 pounds of coffee, or to the amount of 20,000 dollars ; and he ought not to be heard in his allegation, that he has coffee sufficient, but that he chooses to apply part of it to other purposes, according to his own discretion, because he can now undertake to show that part of his coffee was purchased from another source, or with other proceeds than those mentioned in the assignment. Admitting the fact to be so ; yet while no particular rights of third persons are concerned, (and none were when the second assignment was made,) the *specification of the quantity* will control the residue of the description, and cover whatever coffee he may have had on board *to that amount*. Suppose there had been coffee enough on board, but all of it the result of the *Hayti* debt, would the intestate have gone clear of his trust? That cannot be admitted. As the parties were competent to bind, by this second assignment, all the coffee on board, and as they intended to bind 100,000 pounds of it, the intestate must, on every sound construction, be answerable, under his trust, *for that quantity* of his coffee on board, without being permitted to rest on the question, (immaterial in this case,) how, or with what property, he procured it. It lies not in his mouth to impair or defeat his trust, by

such a refinement, in his own favour ; and, especially, ought he to be precluded, if no such discrimination was kept up from the time of the acceptance of the assignment, through all the stages of negotiation and dispute, down to the final hearing of the cause. And, if the second assignment will cover all the coffee on board, to the extent of the quantity specified, there can be no doubt that it limited and controlled the general terms of the first assignment, by designating the special purpose to which the cargo was, in the first instance, to be applied. The first assignment became subservient to the special trust, created and assumed by the second ; and the assignee cannot be permitted to dissipate that trust, by setting up the general and prior assignment made for his own benefit at large.

Another objection to the decree is, that costs were awarded against the defendant, and this objection is much more embarrassing to me than the other. I feel the weight due to the consideration, that the defendant stands before the court as an administrator merely, not as a party to the original trust ; and that the trust rested in parol proof, and did not appear on the face of the assignment, so that the defendant might not have considered himself as bound to regard any mere verbal information of it. As far as the assets of the intestate are concerned, they are justly chargeable with costs ; but I feel reluctant in fixing upon the defendant a wilful or improper resistance to the claim set up in the bill. On the other hand, it appears that he had admitted the trust, and promised to pay the notes. What precise information he had to justify these admissions, does not appear. Perhaps, it was an admission inconsiderately made ; and that he, afterwards, deemed it his duty, as trustee for all the creditors, to resist a claim inconsistent with the terms of the assignment. Shall an administrator make such resistance at his peril, and be charged with costs when no wilful or intentional default is made satisfactorily to appear ; I am by no means persuaded that the defendant did not act according to

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what he deemed his duty, when he confessed the judgment, and when he defended this suit; and, unless I am so persuaded, it is, perhaps, the safer course to exempt an administrator, under all the circumstances of such a case as this, from being charged personally, or, in other words, punished with costs.

I am of opinion, then, that the decree, so far as it awards costs against the defendant personally, be corrected, and no further. I shall not direct that the costs of the administrator, before the surrogate and in this court, be first paid out of the equitable assets arising from *Lawrence's* mortgages. He voluntarily abandoned the surrogate's order, and I see no equity that entitles him to aid for those costs, or for costs arising in this court.

Decree accordingly.

July 14th.

BOYD & SUYDAM against DUNLAP AND OTHERS.

Where a deed is sought to be set aside, as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but suspicious circumstances as to the adequacy of the consideration, and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as security for the sum actually paid.

And where the plaintiff was a purchaser at a sheriff's sale, under a judgment, the court gave the defendant his election to pay the amount of the judgment, interest, and costs, and take a conveyance from the plaintiff: or, in default, to deliver up the deed to be cancelled, on receiving from the plaintiff the sum actually advanced by the defendant.

THE plaintiffs recovered four judgments against *W. Dunlap*, the elder, and *James Gardner*, defendants, on four promissory notes, made in *May, 1811*. Executions were issued, in *May, 1812*, on the judgments, amounting to 1,137

dollars and 37 cents ; and the sheriff having levied on the supposed real and personal estate of *W. Dunlap*, his son, *W. Dunlap*, jun., interposed a claim to the personal property, by virtue of a bill of sale, dated the 30th of *May*, 1811, for the consideration of 348 dollars, and to the real estate by virtue of a deed, dated the 24th of *December*, 1810, from his father, *W. Dunlap*, for the consideration of 1,500 dollars. The bill of sale of the personal chattels had a schedule of the articles annexed, with the value of each, consisting of necessary household furniture, and the names of two witnesses subscribed. A jury of inquiry, summoned by the sheriff, having found the title to the personal property to be in *W. Dunlap*, jun., it was restored to him. The real estate was sold by the sheriff, and purchased by an agent of the plaintiffs, who received a deed from the sheriff, and, on the 16th of *October*, 1812, conveyed the property to the plaintiffs.

The plaintiffs alleged the bill of sale of the personal property, and the deed of the real estate from *William Dunlap*, to his son, *W. Dunlap*, jun., to be voluntary, and without consideration, and made fraudulently, to defeat the creditors of *W. Dunlap*, the elder ; and they prayed that the defendants might produce the deeds, and discover the time of their execution, and the consideration, if any, and that they might be set aside as fraudulent.

W. Dunlap, and *W. Dunlap*, jun., in their answer, admitted the facts stated in the bill, as to the judgments, executions, sheriff's sale, &c. but denied that the bill of sale and deed, between them, were without consideration, or fraudulent. *W. Dunlap*, jun., stated, that on the 3d of *September*, 1804, he agreed to work for his father, as a journeyman saddler, for 18 dollars per month, and continued to work for him until the 5th of *May*, 1808, during all which time he did not receive one fourth of his wages, and there was due to him for wages, 583 dollars ; that, during the years 1808, 1809, and 1810, he advanced 700 dollars, for repairing and finishing

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the house, and erecting buildings on the premises in question ; and, in 1805, he paid 78 dollars in part consideration for the land ; that, in *August*, 1810, his father agreed with him, that if he would move on the premises, and erect some additional buildings, he should have a deed for the premises ; that, accordingly, in the autumn of 1810, he went on the premises, and erected additional buildings, and his father, *December* 24th, 1810, executed to him the deed in question ; that he, afterwards, assumed several debts owing by his father, to *Root & Davison*, and to *Walton & Co.*, amounting to about 310 dollars, and for which, he said, his father gave him the bill of sale of the personal chattels.

It was proved that the value of the real property, in *December*, 1810, was 1,700 dollars, and that it was now worth about 2,500 dollars ; that *W. Dunlap*, the younger, had always lived with his father, and worked at his trade, being now thirty years of age. The father erected the dwelling house and saddler's shop, prior to 1810, and the son, afterwards, built the painter's shop, and repaired the barn. Father and son both lived together in *May*, 1812, as they had done before. The son purchased of one *McClaw* an addition to the lot, for which he paid 75 dollars. The son was considered, in the family, and by others, as the owner of the property, and had the principal management of the business. *Walton*, a witness, stated, that, in *February*, 1812, *W. Dunlap*, the elder, owed *Walton & Co.* 110 dollars, and the son presented his father's account for 102 dollars, and paid eight dollars, the balance. *Root*, a witness, stated, that the account with him and with *Root & Davison*, was kept in the name of *W. Dunlap*, the elder, to whom he supposed the son to be an agent ; that the father gave a note for the balance due, prior to *March*, 1812, of about 400 dollars, which was put in the bank and paid ; that, from *March*, 1812, to *August*, 1814, the goods charged to the father amounted to about 1,325 dollars, part of which still remained unpaid.

It was testified by *Thomas Dunlap*, a brother of *W. Dunlap*, jun., that when the latter came of age, his father offered him all his property, if he would stay with him, and take care of his parents in their old age. That when it was known that his father had become surety for one *Adair*, who failed, the son insisted on a conveyance, according to the old contract, which was done. He had never seen the deed, but believed it was executed before *May, 1812*.

Leslie, a witness, stated, that, in 1811, or 1812, *Gardner*, the defendant, said, that he and *W. Dunlap*, the elder, had endorsed a note drawn by *Charles Adair*, for about 900 dollars, which was passed to the plaintiffs; and which, when due, was renewed by the four several notes on which the judgments were obtained. *Shurleff*, a witness, also stated, that he drew a deed from the father to the son, some years ago, which was executed in his presence, prior, as he believed, to *December, 1810*; and he understood, from both parties, that it was to satisfy a debt, and in pursuance of a previous agreement, in consequence of which the son had repaired the house, and built, &c.

H. Bleecker, for the plaintiffs.

S. A. Foote, for the defendants.

THE CHANCELLOR. The bill seeks for discovery and relief, on the ground of fraud, against a deed of land, and a bill of sale of chattels, alleged to have been given by the elder to the younger *Dunlap*. The plaintiffs appear in the character of creditors, and the younger *Dunlap* sets up a title as purchaser from the debtor. I do not discover, from a view of the pleadings and proofs, such traces of actual and direct fraud, as to feel myself warranted in directing the conveyance of the real estate to be delivered up and cancelled, as absolutely null and void. There is a marked

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difference between an interference actively to compel a party to reconvey or surrender a deed, and a refusal to aid a party who seeks a specific performance of a contract. If actual fraud be not clearly and satisfactorily made out, the court may refuse its aid, but will not take so decisive a step as setting aside, *in toto*, the assumed title; but will either make it subservient to the equity of the case, or leave the party complaining to his remedy at law against a contract founded on inadequacy of price, or other suspicious circumstances. (*Young v. Clerk, Prec. in Chan.* 538. *Griffith v. Spralley*, 2 Bro. 179. n. *Day v. Newman*, cited in *Newland on Cont.* 66.)

The only question with me has been, whether the plaintiffs ought to be left to their legal remedy, or whether the case affords sufficient ground for a limited interference, by allowing the deed of the real estate to stand as a security only for such consideration as has been shown by the younger *Dunlap*. There appears to be very considerable inadequacy of price, even admitting the consideration expressed in the deed, and to allow the deed to stand as security only for the true sum due, would be doing justice to the parties, and granting a relief which cannot be afforded at law. A court of law can hold no middle course. The entire claim of each party must rest and be determined, at law, on the single point of the validity of the deed; but it is an ordinary case in this court, that a deed, though not absolutely void, yet, if obtained under inequitable circumstances, should stand only as a security for the sum really due. (*Proof v. Hines, Cases temp. Talb.* 111. *Grove v. Watt*, 2 Schoale & Lefroy, 492.) A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent. (*Sands v. Codwise*, 4 Johns. Rep. 536. 598, 599. Lord *Eldon*, in 8 *Ves.* 283.) In *Herne v. Meeres*, (1 *Vern.* 465. 2 Bro.

177. n. S. C.,) this last rule of equity is applied to a case like the present. A purchase at a great under value, and with other ill circumstances along with it, was set aside on terms, in favour of creditors. The Lord Chancellor observed, that, at law, where a conveyance was found to be fraudulent, the creditor comes in and avoids all, without repayment of any consideration money ; but, in equity, where the court can decree back the principal and interest, *there is no hurt done, and a lesser matter, in such a case, will serve to set a conveyance aside* ; and he, accordingly, decreed the purchaser to reconvey, upon payment of the consideration, with interest. The same principle is discoverable in the decision in *Bennet v. Musgrave*, (2 Ves. 51.) though the case is imperfectly, or badly reported. A deed, with a small consideration, was set aside in favour of a creditor, on the ground of fraud, *so far as to let in his debt* ; and Lord Hardwicke observed, that the creditor was entitled to his remedy there, whether he could or could not have set aside the deed in an action at law. So, again, in *How v. Weldon*, (2 Ves. 516.,) a fraudulent deed was permitted to stand as a security only for the sum really advanced. Nothing can be more equitable than this mode of dealing with these conveyances, of such indecisive and dubious aspect, that they cannot either be entirely suppressed, or entirely supported, with satisfaction and safety.

Neither of the deeds have been regularly proved and made *exhibits* in the cause, though they were produced on the hearing. This is alleged to have arisen from inadvertence ; and a motion has been made to enlarge publication, for the purpose of proving, formally, the execution of the deeds. Liberty to re-examine witnesses rests in discretion, and is to be governed by circumstances. This is the general rule ; (*Wyatt's P. R.* 420. 2 Ves. 270. *Amb.* 585.;) but, from the view I have taken of the case, this measure need not be resorted to. There is very considerable proof (though not the most direct) of the execution of the deeds

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prior to the judgments. If, in fact, they were not so executed, the plaintiffs need not have come here, and they are at liberty to pursue their full and perfect remedy at law, by ejectment founded on the sheriff's deed. But assuming the conveyance of the land to have been executed at its date, as the answer alleges, and which fact appears pretty evidently from the testimony of *Shurtleff*, one of the subscribing witnesses, then the question occurs, to what extent can relief be afforded against it ?

The circumstances of the case are extremely unfavourable to the fairness of the transaction ; and to give the conveyance absolute validity would be attended with the utmost danger to the rights of property. The very diminished control which the creditor now has over the person of the debtor, greatly enfeebles the common law remedy of imprisonment, as a means of coercion to justice ; and it becomes important to guard, with increased anxiety, against every possible contrivance to cover or withdraw property from the payment of debts. The bill of sale of the household furniture I consider as absolutely void. The defendants have not made out, in proof, any consideration on which it rested when it was made, and the fact of the articles being household goods, and continuing in the same possession after, as before the sale, is decisive against its validity. Lord *Ellenborough* ruled, in the case of *Wordall v. Smith*, (1 *Campbell's N. P.* 332.) that a concurrent possession with the assignor was colourable, and that there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors : and the inducements to the conveyance of the land seem not to have been altogether pure. When the elder *Dunlap* endorsed the notes upon which the judgments were obtained, it was, no doubt, done with the knowledge of the son, and the endorsement was accepted by the creditor, under the presumption (no doubt) that he was the owner of the real and personal estate of which he was then the visible possessor, and had been for

many years the actual owner. The son was brought up in his father's family, and taught his trade, and he continued to reside and work with his father until the age of thirty, and, in the eye of the public, the father's possession of the real and personal estate remained unchanged. He continued to receive the credit due to the owner of the property, and the son took no step, long after the date of the deed, to prevent the public from resting on a misplaced confidence in the soundness of that credit. He permitted the accounts with merchants, as with *Walton*, and *Root & Davidson*, to continue to stand and accumulate in his father's name, and upon the exclusive credit of his father, long after the alleged existence of the transfer of the estate to him. All the witnesses concur in the fact, that the father and son continued to reside together, down to the time of issuing the executions, in the same manner as they had always lived when the son was an avowed apprentice, or journeyman, and boarded with his father. In addition to all this, the deeds were never exhibited, by proof or registry, or otherwise made known to the public ; but it was a family transaction, very reservedly conducted, and attended with the continuance of the same exclusive, or at least mixed, possession. But the circumstance that weighs most strongly against the good faith and purity of the motives of the parties, is the fact that the debt of the plaintiffs existed against the father *before* the date of the conveyance. This appears clearly from the testimony of *Walton* and *Leslie*, and *Thomas Dunlap*. *Adair* was the person for whom the father was surety for the very debt from which the judgments originated ; and when *Adair* failed, the father complained that it was hard for him to pay the debt, as *Adair* had deceived him, and that he had offered to pay half of it ; but, as *Gardner* had refused the proposition, he would not pay. And during the time of this repugnance in the elder *Dunlap* to pay, the son insisted upon the conveyance of the estate to him. It may be that this was done to give the son the preference as a

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bona fide creditor, but when so many inauspicious circumstances occur, the claims of the son ought to be established with very great precision and certainty. He is not entitled to the indulgence of much presumption in his favour.

The claim of the son, at the date of the deed, consisted of arrears of wages as a journeyman, and of expenditures upon the land.

1. His wages for three years and eight months, according to his answer, did not exceed 583 dollars. The fact of his working for that period, after he was of age, and the reasonableness of the charge at 18 dollars a month, exclusive of boarding, is sufficiently supported by proof.

2. The charge of repairing the buildings on the lot, prior to the summer of 1810, is unsupported by proof. There is no evidence of actual payments, nor any *data* by which any can be computed. The testimony, on this point, is perfectly vague; and indeed one of the witnesses, (*Tayler*,) who worked in the shop, says, that the buildings, prior to 1810, were erected by the father; and when we consider that the son, who had been in partnership with that same witness, had stock to the amount of 1,200 dollars, which, in 1810, he carried to *Canada*, there is no reason to presume any considerable previous expenditure on his father's account. It was incumbent on him to have established the fact, and he has totally failed. But there is no doubt that the son built the painter's shop, on the premises, in the autumn of 1810. All the witnesses concur in this fact; and for that improvement he ought to be refunded. It was, doubtless, done under the promise and expectation of a deed; and the land may be considered as an equitable pledge for his reimbursement. The only difficulty is in ascertaining the amount of that expenditure. *Holland* was the carpenter whom he employed to build the shop; and he says "the probable expense was about 800 dollars." This testimony is not sufficiently precise, but it is the best that this case has afforded.

There was, likewise, the sum of 75 dollars, which the younger *Dunlap* paid for the purchase of a small addition to the lot from *L. Claw*; and, if we deduct from these charges, the amount of the goods and chattels which he has wrongfully received, and which were not sold by the sheriff, and are enumerated in the bill of sale, and there valued at 348 dollars, the account will stand thus :

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| | |
|----------------------------|---------|
| Wages due | \$583 |
| Erecting shop | 800 |
| Paid <i>L. Claw</i> | 75 |
| <hr/> | |
| | \$1,458 |
| Credit on the bill of sale | 348 |
| <hr/> | |
| | \$1,110 |

This sum of 1,110 dollars is the utmost for which I can, or ought to, permit the deed to stand as a security.

I shall, accordingly, allow to the defendant, *William Dunlap*, jun., his election, to pay, within 30 days from notice to his solicitor of this decree, the amount of the judgments upon the four notes mentioned in the bill, together with interest thereon, and the taxable costs of the plaintiffs, at law, and in this court; and that the plaintiffs shall, thereupon, convey to him, in fee, the premises mentioned in the deed of the 24th of *December*, 1810, and deliver into his possession the deeds of their title from the sheriff. But in default of such payment, or tender, that the defendant shall, within 30 days thereafter, convey the premises, in fee, to the plaintiffs; and, at the same time, deliver into their possession the deed of the 24th of *December*, 1810, without being chargeable with any previous rents and profits, on condition of a previous payment, or tender, to him, by the plaintiffs, of the sum of 1,110 dollars; and, in that case, neither party shall

1815. have costs as against the other. And if neither alternative be complied with, as aforesaid, that then the bill in this cause shall stand dismissed without costs.

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Decree accordingly.

July 17th.

PETER WILLIAMSON against JANE WILLIAMSON.

A decree of divorce, *a vinculo matrimonii*, though the adultery is fully ascertained, is not granted, *of course*, in all cases. If the husband, subsequently to the adultery, cohabits with his wife, with knowledge of her guilt, it is a remission of the offence, and a bar to a divorce. Lapse of time, also, or a long acquiescence of the husband, without any disability on his part to sue, will be a bar to a prosecution for a divorce. As, where a husband having been absent from his wife for *eight years*, in a foreign country, and she supposing him to be dead, married another person; and the first husband, afterwards, returned, and finding his wife cohabiting with her second husband, without taking any steps to obtain a divorce, went abroad and continued absent for *twenty years*, and then returned again, and filed a bill for a divorce against his wife, who was living with her second husband, by whom she had several children; the court, though the counsel of both parties consented to a decree, dismissed the bill, with costs.

* See *Williamson v. Parisien*, ante, p. 369.

THIS was a bill for a divorce.* The plaintiff stated, that, in 1780, he was married to the defendant, in the city of New-York, where they both resided. That at the time of adultery charged, the plaintiff was, and still is, an inhabitant of, and resident within this state. That during the absence of the plaintiff, on a sea voyage, the defendant, on the 20th of April, 1814, committed adultery with *Philip Parisien*, and had abandoned the plaintiff, and since lived with the said *Parisien*, &c.

The answer of the defendant admitted the marriage with the plaintiff; and that, while the plaintiff was absent, on a foreign voyage, having heard, and believed, he was dead,

she married with *Philip Parisien*, and had since lived, and still lives, with him as his wife.

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The master's report stated, that the defendant was the wife of the plaintiff; and that she had, for a long time, cohabited with *P. Parisien*, as his wife, and had a child by him, and still lived and cohabited with him; and that the adultery charged was sufficiently proved.

A witness, whose testimony was stated in the master's report, deposed, that the defendant married *Parisien* some years ago, on a report of the death of the plaintiff, and had since lived with him as his wife, and had a child by him, about four years old; that the plaintiff returned to *New-York* about three years before, or in *June*, 1812, and solicited the defendant to return to him, which she refused to do.

The affidavit of the plaintiff, which was admitted in evidence by the consent of the counsel of both parties, stated, that the plaintiff resided in *New-York* from 1779 to the 29th of *June*, 1783; that he married the defendant in 1780, and had three children by her; that he was absent from the state from *June*, 1784, to *June*, 1792; that, at his departure, he left the sum of 240 dollars with the defendant, and had frequently written to her during his absence; that he took with him all his other property, and lost it by shipwreck, which induced him to remain absent until he could earn something for himself and family, which having effected, he returned to *New-York*, in *June*, 1792, and found his wife cohabiting with *Parisien*. This event induced him to depart again from *New-York*, and he remained absent until *June*, 1812, when he returned, and has since resided, and intends permanently to reside, here.

The bill and answer were filed in *June*, 1815, on the same day, by consent; and the report of the master, and the affidavit of the plaintiff, were all submitted to the court, by consent; the counsel, on both sides, expressing their wishes that a divorce might be granted.

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Tucker, for the plaintiff.

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Burr, for the defendant.

THE CHANCELLOR. The plaintiff comes not as a *novus hospes* into this court. It is but a few weeks since I dismissed.

**Vide ante*, p. 399. ed the bill between these very parties,* and a new suit for a

divorce has since been instituted, by consent, and brought to a hearing, according to its regular order, on the calendar; and from some negotiation, or accommodation, which does not appear, and to which I mean not to be a party, by giving it any facility, a decree of divorce, though strongly resisted in the former cause, appears now to be a matter of consent and solicitude on both sides. The facts have, accordingly, been very sparingly detailed, but those that are shown, appear to me to be quite sufficient to disclose the merits of the case; and, if it had been otherwise, I should not have very willingly moved until they had been disclosed. To guard against all kind of improper influence, collusion, and fraud, it is the policy of the law not to proceed upon the ground of the consent of parties, to a dissolution of the marriage contract, and I shall consider this case precisely as if a serious controversy existed, and the parties stood adversely to each other, upon their respective rights arising out of the case.

It is not for me to say, whether the statute is too severe in applying, indiscriminately, to every case of a divorce for adultery, the prohibition to the party convicted to marry again, though the adultery may have been committed by a remarriage after the absence of the other party for five years, and accompanied with very credible information, or with the presumption and belief, of his death. The ecclesiastical law will not admit any such presumption of death to excuse the guilt of the second marriage, holding it to be no public inconvenience that the wife should remain a widow; but a very great inconvenience, and a violation of the sanctity of the contract, that she should marry again,

under any circumstances, during the lifetime of her first husband. (*Fournel, Traite de l'Adult.* part 1. ch. 6. art. 2. sect. 3.) In *Holland*, however they have guarded against the occurrence of this inconvenience, by a general ordinance authorizing the courts to allow a second marriage, if the husband is absent for five years without being heard of. (*Voet, lib. 23. tit. 2. de ritu nuptiarum, sect. 99.*) But whatever opinion may be entertained of the policy of that provision in our statute, I cannot think the statute intended that the party injured should be entitled to come, *at any time*, and *in every case*, and to put the cause on the single dry question, has an act of adultery, in judgment of law, been committed? Nothing could operate more unjustly than such a construction. The statute says, that, after the truth of the adultery charged shall have been ascertained, "it shall be lawful for the court" to decree a dissolution of the marriage. This language may, and ought to be understood, as leaving to the court the exercise of that sound discretion which the nature of the case, and the principles of equity, might require. The general rules of the *English* jurisprudence, on this subject, must be considered as applicable, under the regulations of the statute, to this newly-created branch of equity jurisdiction. It is not to be supposed that the statute intended, in all cases of adultery charged and proved, that the court should be absolutely bound (no matter under what circumstances) to grant to the prosecutor the effect of a suit carried on for his own benefit. It is to be recollectcd, that a bill for a divorce is not a public, but a private prosecution, brought at the instance of the party aggrieved, and subject to his control. Cases may be stated of adultery proceeding from surprise, error, the previous consent of the husband, or followed by his subsequent reconciliation, or long acquiescence, in which it is admitted, by all the authorities on this subject, that it would be repugnant to the principles of reason and justice, that the husband should be permitted to prosecute his wife; and by the ec-

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1815. ~~WILLIAMSON v. WILLIAMSON~~ clesiastical law, the husband cannot obtain a divorce for adultery, if the wife recriminates, and can prove infidelity on his part. (*Oughton's Ordo Judiciorum*, vol. 1. tit. 214. *Burn's Ecclesiastical Law*, tit. *Marriage*, sect. 11. *Fournel, Traite de l'Adult.* p. 71. 128. *Dig.* 48. 5. 13. 5.) It was observed, in reference to one of the instances I have supposed, by the late Ch. J. Parsons, (and it is not in my power to avail myself of more respectable authority,) that it would be unjust and immoral for the husband to claim and enjoy the society of his wife after a knowledge of her offence, and then be permitted to cast her off for that same offence, and dissolve the marriage. (6 *Tyng's Rep.* 147. *Anon.*) It is, indeed, a general principle, recognised as every where pervading this branch of jurisprudence, that subsequent cohabitation with the wife, with knowledge of her guilt, is a remission of the offence, and a bar to a divorce.

I think enough has been said to show, that a decree for a divorce is not to be taken as *of course*, though the fact of adultery may have existed; and I cannot but persuade myself, that when the statute created a jurisdiction in this court, for the cautious and limited exercise of the power of divorce, it intended that those settled principles of law and equity on this subject, which may be considered as a branch of the common law, should be here adopted and applied.

The lapse of time will, also, and on the soundest principles of justice and policy, form another exception to the right of prosecution for a divorce. An acquiescence of five years, without any existing disability, was, by the civil law, and is, by the law of the continental nations who have adopted the civil law, a bar to a prosecution for adultery. (*Dig.* 48. 5. l. 29. et 31. *Voet*, h. t. n. 22. *Ibid.* lib. 44. 3. n. 7. *in fine.* *Fournel, Traite de l'Adult.* p. 67.) The injured party is presumed to have pardoned or remitted the offence. We find no certain rule on this point in the *English* law, because, since the time of *Elizabeth*, (see *Rye v.*

Fuliambe, Moore, 683.,) divorces, *a vinculo*, are not granted for adultery, except by act of parliament; but a limitation is imposed by the rules of parliament, as by a standing order of the commons, (of the 10th of June, 1773, and see the old rule in 8 St. Tri. 35. n.,) no bill of divorce for adultery can pass until an action for *crim. con.* has been prosecuted at law, to judgment, or sufficient cause shown why it has not; and we know that six years is a bar to such a suit. Long acquiescence will, under our law, bar a prosecution for any other civil injury, and why not for this? Why may not the court in this, as in other cases, raise presumptions in bar by analogy to the statutes of limitation? We may, perhaps, venture to say, that to sustain a bill of divorce for adultery, after the husband (as in this case) has acquiesced under a knowledge of it, for twenty years, would be repugnant to the institutions of all mankind.

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In the present case, the husband returned in 1792, and found his wife recently married, in consequence of his long absence of eight years, and presumed death. Why did he not then reclaim her, or prosecute? He did neither; but departed again from this state, and lived continually abroad, for 20 years, acquiescing in this second marriage, and suffering her offence to aggravate and become inveterate. She has had several children, and has spent the best part of her life in connexion with her present partner. If ever lapse of time, or long acquiescence, formed a just bar to this kind of prosecution, this is one. Can it be fit, or decent, or useful, that without any reason or apology for this delay, he should now be permitted to come into court to expose and disgrace this woman? Most certainly not; and I shall, accordingly, decree that this bill be dismissed, with costs.

Decree accordingly.

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EARL.

v.

GRIM.

EARL AND OTHERS *against* GRIM AND WIFE.*August* 8th.

Where a testator directed his real estate to be sold by his executors, and the proceeds to be put out at interest, on good security, and the *interest* to be annually paid, in equal proportion, to A., B., and C., and the survivors of them, without limitation of time, but was silent as to any further disposition as to the principal or residuum of his real estate; this was held to be a bequest of the *principal* as well as the *interest*; it being apparent, from the introductory, and other clauses in the will, that the testator did not intend to die intestate, in that respect.

MARGARET JAUNCEY, of *New-York*, widow, being possessed of considerable real and personal estate, on the 29th of *August*, 1798, made her will, the parts of which, material to be stated, were as follows: "My worldly substance I do dispose of as follows; to my step-daughter, *Sarah Jauncey*, I do give and bequeath such a portion of my household furniture," &c. "The rest of my household," &c. "I direct my executors to sell," &c. "and apply the proceeds thereof to the discharge of a debt secured, by mortgage, on my house fronting the street formerly called *King-street*," &c.

"Whereas, it hath pleased Almighty God to bless some of my connexions with affluence, insomuch, that a share in the property I may leave at my death would not add to their comfort, I have, therefore, concluded to distribute my substance among such of my relations, as, in my judgment, stand most in need of it," &c. "I do give and bequeath to my said step-daughter, *Sarah Jauncey*, during the term of her natural life, the use, rents, and profits of my dwelling-house and lot of ground," &c. "fronting the street formerly called *King*, now *Pine-street*," &c. "in which she has already had one fifth part by right of inheritance from her father," &c. "And, after her decease, it is my will that the said dwelling house," &c. "shall be sold by my executors," &c. "and the nett proceeds, after paying all charges, shall be

divided as follows: To my nephew, *George Peck*, one sixth part; to my nieces, *Ann Alstyne*, *Phoebe Earl*, *Ann Willis*, and *Jane Willis*, each one sixth part, and to the survivors of them; and the remaining sixth part I do give to *David Grim*, the husband of my niece *Mary*," &c. "And I do further will and direct, that my executors may, at any time during the life of the said *Sarah Jauncey*, with her consent, sell and dispose of the said dwelling house," &c.; "and, in such case, the moneys arising from the sale thereof (after discharging all encumbrances) shall be put out at interest," &c. "and the interest paid annually to the said *Sarah*, during her natural life; and, after her decease, the *said moneys should be equally divided*, as is above directed, and to the survivors of them." "Whereas the house in which I now reside, in *Beekman-street*, is my property, I do will, and direct my executors to rent or sell the same, as they shall think fit," &c.; "and in case of renting the same, the moneys arising therefrom shall be divided as follows:" (To her nephew and nieces, and to *D. Grim*, a sixth part each, as directed in regard to the house in *Pine-street*;) and in case of sale, she directed as follows: "The moneys arising from the sale, after paying all charges, shall be put at interest on good security, and the interest thereof be annually paid, in the proportions above mentioned, to the said *George Peck*," &c. "and the survivors of them." And after empowering her executors to execute deeds to purchasers, she added, "My will further is, that the rents due, or to become due, on my house in *Beekman-street*, &c. shall belong to my step-daughter, *Sarah Jauncey*, until the first day of May next ensuing after my decease; and if any thing be remaining of my personal estate, after paying off the mortgage, &c. I hereby give and bequeath the same to my said step-daughter, *Sarah Jauncey*." And the testatrix appointed *David Grim*, (the defendant,) *William Rhinelander*, and *Nicholas Bayard*, her executors.

Peck, the nephew, died before the testatrix, leaving two

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children. *Ann Alstyne* died after the testatrix, and before *Sarah Jauncey*, without issue. *Grim*, who was the acting executor, sold the lot in *Beekman-street*, and received the money. The bill charged that the executors refused to sell the lot in *Pine-street*, and to divide the principal of the proceeds of the lot in *Pine-street*, according to the will; and prayed that *Grim* might be directed to sell the lot in *Pine-street*, and distribute the proceeds of the sale, and of the lot in *Beekman-street*, according to the directions in the will; and that he might account, &c.

The answer of *Grim* admitted, and set forth the will; that the testatrix died in 1800; that he acted solely as executor; that the testatrix was seised, &c.; and the death of *Peck* and *Ann Alstyne*, as stated in the bill; that *Sarah Jauncey* died in 1814; that the lot in *Beekman-street* was sold for 3,580 dollars; and there remained, after paying debts, 2,000 dollars, which had been put out at interest, and the interest received and paid according to the will; that the lot in *Pine-street* was unsold; and he submitted to the court whether the plaintiffs, the legatees, were entitled to the principal arising from the sale of the *Beekman-street* lot, not being advised as to the true construction of the will; and he duly accounted, &c. and was ready to sell the lot in *Pine-street*, and payed the direction of the court, &c.

The case was submitted to the court, on the bill and answer.

Wilkins, for the plaintiff.

Slosson, contra.

THE CHANCELLOR. This suit was brought for the purpose of obtaining the direction of the court as to the distribution of the proceeds of the lands ordered to be sold by the executors.

There is no question as to the *Pine-street* property; the difficulty among the parties has arisen respecting the house and lot in *Beckman-street*.

This lot having been sold by the executor, and the nett amount, to 2,000 dollars, placed at interest, according to the directions of the will, it is admitted that the legatees are entitled to the *interest*, to be paid annually; and the great point is, whether the *principal sum* is, also, to be distributed among those legatees, under the will, which directs "the moneys arising from the sale to be put at interest, on good security, and the interest thereof to be annually paid, in the proportions above mentioned, to the above legatees, and the survivors of them." The will is silent as to any further disposition of those proceeds; and yet I am persuaded, from a consideration of the whole will, that the testatrix did not intend to die intestate as to those proceeds. In the introductory part of the will, she says, "*my worldly substance I do dispose of, as follows;*" and, afterwards, she uses these words, "whereas it hath pleased Almighty God to bless some of my connexions with affluence, insomuch that a share in the property I may leave at my death would not add to their comfort, I have, therefore, concluded to distribute *my substance* among such of my relations as, in my judgment, stand most in need of it," &c. And, in the devise of the proceeds of the two lots, she gives the nett proceeds of the former lot, out and out, to the same legatees; and she makes no disposition over of the *residuum* of her real estate; for the last clause in the will declaring, that "if any thing be remaining of her *personal* estate, after paying off the mortgage," &c. "she gave it to her step-daughter, *Sarah Jauncey*," alluded only to the personal estate that she left, and not to those houses and lots; and the clause is, also, to be taken in connexion with one in the former part of the will, directing her executors to sell her furniture, plate, &c. and to apply the proceeds to the discharge of a mortgage on the *Pine-street* lot. It was the surplus of those

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The proceeds of the *Beekman-street* lot, principal as well as interest, are, therefore, to be distributed by the executor, equally, between the three plaintiffs, *Phabe Earl*, *Ann Willis*, and *Jane Willis*, and the defendant, *David Grim*, and the personal representative of *Ann Alstyne*, deceased. The share of *Ann Alstyne* was vested in her, at her death; and the share of *George Peck*, who died in the lifetime of the testatrix, went equally to all the surviving legatees.

Decree accordingly.

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— * —

August 14th.

A. & T. UNDERHILL against VAN CORTLANDT AND OTHERS.

It is not of course to enlarge the rule to pass publication, and it will be refused where there has been great delay: but it was granted, until the plaintiffs had sufficiently answered a cross-bill of the defendants.

A MOTION was made, that the rule to pass publication, in this cause, be enlarged, until the plaintiffs had put in and perfected their answer to a *cross-bill* filed by the defendants.

Issue had been joined, and witnesses examined on the part of the plaintiffs, when one of the defendant's died; and the answers of all the present defendants to the bill of revivor, and supplemental bill, were not put in until the 8th of *May* last; and the cross-bill was filed the 23d of *June* last. The rule to pass publication, or show cause, was entered on the 7th of *July* last; and the time for the present plaintiffs to answer the cross-bill will not expire until the 1st of *September* next.

Murro, in support of the motion, cited *Wyatt's Pr. Reg.*
87. and *Cooper's Eq. Pl.* 87.

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Lee, contra, resisted the application, on the ground that the defendants had been as dilatory as possible, in the original suit, as well as in the prosecution of the cross bill, and cited *Aylet v. Easy*, 2 *Ves.* 336.

THE CHANCELLOR. The motion to enlarge publication is not of course, but the circumstances of delay are not sufficiently strong to induce a refusal of it, altogether, in this case. To enlarge the rule for publication, only until the present plaintiffs shall have sufficiently answered the cross-bill, puts it in their power to put an end to the delay, at any time, and to bring on their cause to a hearing.

Motion granted.

BRUMLEY against FANNING AND DEVOE.

Sept. 14th.

A mortgagor, who has sold his equity of redemption, without taking any security as indemnity against his bond, cannot have an injunction to stay waste against his vendee, on the ground that he will be answerable for what the land may fail to satisfy the mortgage.

THIS was a bill for an injunction. On the 2d of April, 1812, the plaintiff purchased a farm of the *Westchester Manufacturing Society*, and gave a bond and mortgage to secure part of the purchase money. On the 22d of September, 1812, he conveyed the equity of redemption to *Fanning*, subject to the mortgage, which *Fanning* undertook to discharge; but the plaintiff took no security, by way of indemnity against the bond. *Fanning* did not discharge the

1815. Woods v. Monell. mortgage, but sold his equity of redemption to *Devoe*, who, as the bill stated, was committing waste on the premises. A suit was pending to foreclose the equity of redemption, and, also, a suit at law on the bond.

Munro, for the plaintiff.

THE CHANCELLOR. The plaintiff has parted with his fee, at law, to the mortgagees, and has sold his equity of redemption to *Fanning*. He, therefore, has no *interest* remaining in the land, and can have no action concerning it. On what ground, then, can he enjoin the exercise of the rights of the owner? He will be answerable for what the land fails towards satisfying the debt; so must a surety for the insolvency of his principal; but can he control his improvident acts?

Injunction refused. (a)

(a) Vide *Scott v. Wharton*, (2 Hen. & Mun. Rep. 25.)



Sept. 27th.

WOODS AGAINST MONELL AND OTHERS.

Where a tract of land is divided into separate and distinct lots and parcels, it is the duty of the sheriff, who has an execution against the land, to sell it in parcels, and not the whole tract together. But, to set a sheriff's sale aside, there must be satisfactory evidence of fraud, or abuse of power, in the sheriff.

THE bill stated, that on the 30th of *July*, 1812, *Sackett*, one of the defendants, was seised of the premises, being indebted to the plaintiff and others; and, in order to secure them, conveyed the premises to the plaintiff, his heirs and assigns; and the deed was registered the 6th of *August*, 1812. The premises are described as situate in the town

of *Newburgh*, being lot No. 34., and the easterly end of lot No. 38., containing three acres and a half, bounded south by the turnpike road, east by *Liberty-street*, north by land of *Smith*, &c. and west by land of *Taylor*, &c. excepting, out of the said tract of land, 10 lots fronting on the turnpike road, before sold. At the time of the execution of the deed, the plaintiff gave to the defendants a declaration of *trust*, covenanting to sell such part of the said lands as were unencumbered, and apply the proceeds towards discharging incumbrances on the residue, and after the encumbrances were removed, to sell the residue of the lots or parts of land, and apply the proceeds to pay the residue of the debts of *Sackett*, and return him the overplus, if any. The plaintiff took possession under his deed, and leased the premises to *Jonathan Hasbrouck*. At the time of the conveyance, a part of the premises were encumbered by a mortgage to *W. Lawrence*, for 3,500 dollars ; and the premises, by a judgment in favour of *Austin* and *Andrews*, for 1,114 dollars, and which judgment, after the deed, was sold to the defendant, *Monell*. A judgment was docketed, the 18th of *July*, 1812, in favour of *E. Griswold*, against *Sackett*, for 84 dollars and 92 cents ; and another judgment was docketed against *Sackett*, in favour of *Duryee* and *Heyer*, for 394 dollars and 62 cents. *Monell* refused to sell his judgment to the plaintiff. Executions were issued on all the judgments, and the sheriff sold all the premises together, at once, under the judgments, on the 23d of *February*, 1813, subject to all encumbrances. The bill further stated, that the premises consisted of town lots, and might have conveniently been sold separately ; that *Sleight*, who was the attorney of *Duryee* and *Heyer*, and the defendants, *Monell* and *Weller*, attended the sale. The plaintiff was, also, present, and gave notice of his deed of trust, and requested the sheriff to sell in parcels, and not on any judgment posterior to the date of his deed. That a bill was then pending by *Lawrence* to foreclose his mortgage. The premises were sold and conveyed to *Sleight*, the highest

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bidder, for 1,200 dollars, in behalf of *Monell* and *Weller*, to whom he afterwards conveyed. That the premises were worth, over and above the mortgage, more than 10,000 dollars. That the defendants, *Monell* and *Weller*, had commenced actions of ejectment to recover possession of the premises. The plaintiff offered to pay off the judgment in favour of *Griswold*; and prayed an injunction to stay the action of ejectment; and that the sale, by the sheriff, might be set aside as fraudulent and void.

The answer of the defendants admitted the deed of trust to the plaintiff, the judgments, executions, sheriff's sale, &c.; that the plaintiff requested the sheriff to sell in parcels; that he sold the whole together under the three executions, and declared that the sale was subject to all encumbrances; that the premises had been laid out into town lots on a map; but no one informed the sheriff of the divisions or numbers of the lots; nor did it appear that they had been divided, except on paper. *Monell* denied that the plaintiff had offered to purchase, or that he had refused to assign to him the judgment of *Austin & Andrews*. That the premises sold for nearly their value, and would not have brought much more had the sale been in distinct parcels or lots.

Sackett, son of the defendant, *Sackett*, who was sworn as a witness for the plaintiff, stated, that the premises, at the time of the sheriff's sale, were worth about 12,000 dollars, and were divided and laid out into lots, to the map of which he referred; and that, at the time of the sale, they were divided into five separate lots by fences. That he was present at the sale, and the sheriff declared that he sold by virtue of the three executions in favour of *Austin & Andrews*, *Griswold*, and *Duryee & Heyer*; that the plaintiff requested that the premises might be sold in parcels, and *Monell* said he did not know him in the business. The sheriff declared that he should sell all the right of *Sackett*, in the premises; that the plaintiff informed the sheriff, and those present, of his deed, and requested the

sheriff to sell on the first judgment only ; that it was generally known at Newburgh that the premises were divided into town lots.

D. Wright, another witness for the plaintiff, who was acquainted with the premises, and was present at the sale, said that they had been laid out into building lots, but he did not recollect seeing any cross fences ; that the plaintiff requested the sheriff to sell in parcels, and on the first judgment only ; that *Monell*, the defendant, said he did not know the plaintiff in the business, and directed the sheriff to proceed and sell all the premises together, under all the judgments ; that *Sleight* gave similar directions to the sheriff. The sale was near by, and in view of the premises. The map, which was produced, was dated November, 1812.

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P. A. Jay, for the plaintiff.

Burr, contra.

THE CHANCELLOR. The suit is brought to set aside the sheriff's sale, on the ground of fraud. The plaintiff has not made out a case of actual fraud ; and if the sale is invalid, it must be because the premises described in the case were sold contrary to law, by being sold entire, and not in parcels, as the plaintiff requested.

I have no doubt of the value and solidity of the rule, that where a tract of land is in parcels, distinctly marked for separate and distinct enjoyment, it is, in general, the duty of the officer to sell by parcels, and not the whole tract, in one entire sale. To sell the parcels separately is best for the interest of all the parties concerned. The property will produce more in that way, because it will accommodate a greater number of bidders, and tends to prevent odious speculations upon the distresses of the debtor. Nor does the officer act within the spirit of his authority, if he sells more than is requisite to satisfy the execution. To

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sell a whole tract, when a small part of it would be sufficient, or, probably sufficient, for the purpose, is a fraud that ought to set the sale aside. The principle which I have suggested has received a judicial sanction; (*Rowley v. Webb*, 1 *Binney*, 61. *Executors of Stead v. Course*, 4 *Cranch*, 403. *Hewson v. Deygert*, 8 *Johns. Rep.* 333.;) and whenever a case comes fairly within the reach of it, I shall very willingly adopt and apply it.

But I do not perceive that the circumstances of this case are sufficient to warrant the application of the rule.

The plaintiff was present at the sale, and became a bidder. He requested the sheriff to sell the premises by lots, and not in one entire parcel; but he produced no map or other description of the ground as laid out in lots. In the deed of trust under which the plaintiff claimed title, and which had been executed to him by the defendant in the execution, about six months before, the ground was not designated by lots, but was described as a "certain lot, piece, or parcel of land, known and distinguished on a map, &c. as lot No. 34., and the easterly end of lot No. 38., containing three and a half acres, and bounded," &c. And when the plaintiff took possession of this "said tract of land," under his deed, he leased the same as one entire parcel to *I. Hasbrouck*; and so it appears to have been enjoyed at the time of the sale.

The sale is represented as having been made on the land. To bring the sheriff in default, or to charge him with an abuse of trust, the plaintiff, who was then in possession, and claimed the land, ought, at least, to have furnished the sheriff with clear and distinct proof of the division of the three acres into town lots, and of the size and description of these lots, and that the same was the act of the owner. So small a tract, and under the occupation of one tenant, will not, without other circumstances, raise the presumption of an abuse of power in the sale. One of the witnesses says, that the premises, at the sale, were divided into five lots, by fences; but

the other witness, who was also present at the sale, says, he does not recollect any cross fences, and if they were then visible, the whole was still in the occupation of one tenant; those fences could not have been intended for the evidence of any division in pursuance of the map to which the witnesses refer, and which is made an exhibit in the cause; for by that map, the ground was divided into a great number of small lots; and it bears date within three months of the sale.

There is another objection which has been suggested. The sheriff had in his possession, at the time of sale, executions on three judgments against the same defendant, two of which were older, and the other younger, than the deed of trust to the plaintiff; and he did not discriminate distinctly, at the outcry, that he sold under the oldest execution exclusively; but it is left to be inferred, that he sold, generally, under those three executions, all the right and title of the defendant. There was no concealment in the case of any fact. The executions were all known and mentioned, and I do not perceive any abuse of power in this circumstance that can affect the sale. It is admitted that the sheriff sold under the first execution. The deed to the purchaser mentions the two first executions, and them only; and as the first execution would pass all the title of the defendant, every bidder knew, or was bound to know, that his title would have been perfect under the sale, subject only to encumbrances prior to the first execution, and of such encumbrances every one had the means of knowledge as well as the sheriff.

I see no sufficient ground, therefore, upon which this bill can be sustained; and it must, accordingly, be dismissed as to all the defendants, with costs.

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Decree accordingly.

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DUNSCOMB AND OTHERS against *The Executors of DUNSCOMB.*

Executors and other trustees are chargeable with *interest*, if they have made use of the money themselves, or have been negligent, either in not paying over the money, or in not loaning or investing it, so as to render it productive. The time from which interest is to be charged, in case of negligence, varies according to circumstances. Six months from the time the money was received, is a reasonable period, in most cases, from which to charge interest against the trustee.

Where a testator devises his real estate to his daughter, and empowers and directs his executors to sell the real estate, and the daughter marries and has a child, which dies, and the mother also dies before the sale of the estate, leaving a husband, he is entitled, as tenant by the curtesy, to have the *interest* of the money arising from the sale secured and paid to him, during life, in lieu of the rents and profits of the land.

Though the *general rule* is, that executors must pay *costs* when they pay *interest*, because they are in default; yet, where the devisee, or *curtesy que trust*, demand more than he is entitled to receive, and the executor properly submits to the direction of the court, he will not be compelled to pay *costs*.

THE bill stated, that the plaintiffs are the only surviving children and heirs of *Andrew Dunscomb*, son of *Daniel Dunscomb*, deceased. That *Daniel Dunscomb*, on the 7th of January, 1795, made his will, and devised the one fourth of all his estate, real and personal, to his son *Andrew*; and if he died before the testator, then his share to go to his children, in equal proportions. The testator gave to his executors power and direction to sell his estate, and divide the proceeds according to his will. The executors, on the death of the testator, took possession of the estate, real and personal, and sold the real estate, and received the proceeds, and also the rents and profits before the sale. *Andrew*, at his death, left five children, two of whom, *Catharine*, and *Andrew B.*, died. *Catharine* married one *West*, who is still living, and by whom she had one child, since deceased,

without issue. *Andrew B.* died after his sister, under age, and without issue. The three surviving children, plaintiffs, claim the share that would have come to their father under the will, of which they alleged there remained due to them 1,731 dollars and 84 cents, with interest ; and they prayed for an account, and that the executors might be decreed to pay the amount, with interest.

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The answer admitted the will, the receipt of the rents, &c. the sale of the real estate on the 31st of *January*, 1804, that Mrs. *West* never had actual possession of the real estate before it was sold ; but there was no adverse possession, the possession being actually held by the defendants, as co-devisees and co-tenants, in common ; that Mrs. *West* died two days before the sale of the real estate ; and the other persons at the times mentioned in the bill ; that the husband of Mrs. *West* is still living, and resided, and still resides, out of the state ; that the share of the nett proceeds due to Mrs. *West*, was 1,046 dollars and 36 cents ; that on the 23d of *April*, 1805, the defendants paid to the guardian of the two infant plaintiffs, 3,500 dollars, leaving 685 dollars 47 cents, which the defendants have always been, and are still, ready to pay to the plaintiffs, if right and proper ; that the plaintiffs are next of kin of *Andrew B. Dunscomb*, deceased ; that the husband and administrator of Mrs. *West* claimed the 1,046 dollars and 36 cents, being her share, as *personal estate* ; and the defendants denied the claim, as the real estate was not sold at the time of her death ; that her husband now claims *interest* on the amount, as tenant by the *curtesy*, for *life*, and that the principal ought to be put out on security, for that purpose ; that the plaintiffs do not acquiesce in either claim of the husband of Mrs. *West*, and the defendants do not know to whom the money can be paid with safety.

The defendants denied that they ought to pay *interest*, as they had always been ready to pay the principal, when advised or directed by this court how the same ought to be

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~~Dunscomb v. Dunscomb.~~ paid ; and they claimed to have their costs allowed to them out of the fund in their hands.

The cause was submitted to the court on the bill and answer.

Irving, for the plaintiffs.

Riggs, for the defendants.

THE CHANCELLOR. 1. The plaintiffs are entitled, of course, to the sum of 685 dollars and 47 cents, and the only point, on this part of the case, is, whether they are entitled to interest upon that sum, which has lain unproductive for many years in the hands of the defendants. Why it was not paid to the guardian of the plaintiffs, (who was also guardian of *Andrew B. Dunscomb*, in his lifetime,) and to whom the other portion of the moneys belonging to them was paid, does not appear. The executors say it has always been kept in readiness to pay to the persons entitled, when demanded. But this is no sufficient excuse. If they had met with any real doubt or difficulty, as to the person authorized to receive, they could have applied to the court for advice, or brought the money into court. If the money (as we are at liberty to suppose) has been mingled with their own moneys, it has answered the purpose of credit, and the rule is settled, that executors, and all other trustees, are chargeable with interest, if they have made use of the money themselves, or have been negligent, either in not paying the money over, or in not investing it, or loaning it, so as to render it productive. (*Treves v. Townshend*, 1 Bro. 384. *Rocke v. Hart*, 11 Ves. 58.) The rule is founded in justice and good policy ; it prevents abuse, and it indemnifies against negligence. This was also the rule in the civil law, when the guardian was guilty of negligence in suffering the money of the minor to lie idle. *Quod si pecunia mansisset in rationibus pupilli, prastandum quod bona fide per-*

cepisset, aut percipere potuisset: sed faenori dare cum potuisse, neglexisset. (Dig. 26. 7. 58.)

The defendants must, in this case, account for interest on the above principal sum; and as to the time from which interest is to be computed, in such a case of negligence in suffering the money to lie idle, there does not appear to be any absolute rule, and the time must vary according to circumstances. It would be laying too heavy a hand upon executors, to charge interest from the moment money was received. In some cases, executors are allowed a year to look out for some due appropriation of the money, and in other cases it would be unreasonable. Here the executors show no pains or effort to discharge themselves of the money. I observe that six months was the time allowed, in a like case, by the civil law, to the tutor to invest the funds; (*Domat*, b. 2. tit. *Tutors*, ch. 3. s. 23. *Voet*, lib. 26. tit. 7. s. 9.;) and if the defendants are charged with interest after six months from the time they received it, it will not be unreasonable in this case, and I shall accordingly direct it.

2. The husband of *Catharine P. West* is entitled, as tenant by the courtesy, to the interest of the proceeds of her share of the real estate, which was sold after her death. His right became perfect upon her death, and he was seised in fact, by the seisin and possession of the co-devisees, as tenants in common with her, and claiming only their undivided shares with her under the will. It will, therefore, be the duty of the defendants to place the sum of 1,046 dollars and 36 cents at interest, on good real security, or invest it in public stock, and pay the interest thereof to *William West*, as the same shall from time to time accrue, during his natural life; and the plaintiffs, and their lawful representatives, will be entitled to the principal, upon his death. The case of *Sweetapple v. Bindon*, (2 *Vern.* 536.) contains the rule applicable to this case, allowing the interest of money to be settled upon the tenant by the courtesy, in lieu of the profits of the land.

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3. The only remaining point in the case is as to costs. It does not follow, as an inevitable consequence, that executors must pay costs in all cases where they must pay interest; though the *general* rule is, that they must pay costs when they pay interest, because they are in default. (1 *Ves.* jun. 294. 7 *Ves.* jun. 129. 11 *Ves.* jun. 61. 582. 13 *Ves.* jun. 402.) If the demand of the plaintiffs had been confined to the sum of 685 dollars and 47 cents, the defendants ought to have paid costs; but the demand went further, and embraced a larger sum, to which the plaintiffs are not entitled until the death of the tenant by the courtesy. That demand has been successfully resisted, and it was a question properly submitted by the executors to the direction of the court. Under the circumstances of the case, I cannot allow costs to either party, as against the other.

Decree accordingly.

—*—

Sept. 27th.

SHOTWELL *against* MURRAY.

A sale under a second, or junior judgment, is not, of itself, a waiver of the plaintiff's rights under a first or elder judgment.

Every person is bound to know the law; and where there is no mistake as to the fact, but only as to the legal consequence, and that on a collateral point, there can be no ground for relief, either by vacating a sale, or by a perpetual injunction against the exercise of the defendant's rights.

A. having two judgments, of different dates, against G., issued execution on the second, under which the land of the debtor was advertised for sale by the sheriff. A. was present at the sale, and gave directions, but was entirely *silent* about the first judgment, and as to any intention, afterwards to enforce it. B. having some claim to the land, in order to protect his title, became the purchaser at the sheriff's sale, and received a deed, though he previously knew of the existence of both judgments.

B. filed a bill for a perpetual injunction against A.'s proceeding under the first judgment, on the ground of mistake, or fraud; but the bill was dismissed, with costs.

ON the 8th December, 1807, Munro obtained a judgment in the supreme court against Green, which became a lien on

land of *Green*, in the town of *Schuyler*, in *Herkimer* county, being lot No. 50., in *Cosby's Manor*. In *August*, 1811, a *test. f. fa.* was issued on the judgment, and the lot, with other lands, was conveyed, by the sheriff, to the plaintiff, as the highest bidder, on the 12th of *December*, 1812. The defendant, afterwards, purchased two judgments against *Green*, which were duly assigned to him, one of them docketed the 24th of *April*, 1799, and the other, on the 20th of *December*, 1808; and, in 1813, the defendant issued an execution on the second judgment, and directed the sheriff to sell the lot in question; and the same being exposed to sale by the sheriff, the plaintiff, in order to protect his title, became the purchaser at the second sale, for 2,700 dollars, and received a deed from the sheriff.

The bill further stated, that the defendant attended at the last sale, and bid, and gave directions to the sheriff, but did not then, or at any prior time, make known that he should have any further or other lien on the land after the sale, or that he should again proceed to sell the same under the other judgment; nor did he in any manner declare or intimate, that such sale was made subject to the prior judgment of *April*, 1799, although the defendant, on that occasion, and at other times, admitted that he was the owner of both judgments. The plaintiff alleged, that he purchased the land at the second sale, in full confidence that the premises would, thereby, be exonerated from all further lien, by means of the judgments held by the defendant. But the defendant, however, afterwards, issued an execution on the other judgment, and was proceeding to advertise the land again for sale. The bill prayed for an injunction to stay all proceedings on the second judgment and execution of the defendant; and that the same might be made perpetual; and for general relief.

The defendant, in his answer, admitted that he was present at the sale, and bid, and gave directions to the sheriff;

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and that he did not make known that he should have any further or other lien on the land ; or that he should again proceed to sell it under the prior judgment ; and that he did not declare, or intimate, that the sale was made subject to the *lien* of the prior judgment ; but he insisted, that he did not thereby relinquish his lien on the prior judgment ; and averred, that the plaintiff *knew*, at the time, that he was the owner of both judgments, and had applied to him to purchase them. He, also, admitted, that he had issued an execution on the other judgment, and had directed the sheriff to levy again on the same lot, and intended to proceed in the sale.

It was proved that the plaintiff had applied to purchase the judgment of April, 1799, before the same was assigned to the defendant.

Riggs and Slossen, for the plaintiff. They cited *Livingston v. Byrne*, 11 Johns. Rep. 555. *Hewson v. Deygert*, 8 Johns. Rep. 333.

Wells, for the defendant.

THE CHANCELLOR. The question is, whether the defendant lost the benefit of the lien of the elder judgment by selling the land under a younger judgment, without disclosing, at the time of sale, that he held, and intended to hold, the former judgment as a subsisting and valid encumbrance. The defendant admits that he attended the sale, and gave directions concerning it, and was himself a bidder ; and that he was silent on the subject of the prior judgment. If the lien of that judgment, on the land so sold, be lost or impaired, it must be because his silence amounted to fraud in suffering the plaintiff to purchase under some erroneous impression, which it was his duty to remove ; for it will hardly be contended, that if a creditor has two judgments upon the same land, the mere fact of his selling under the last, is, *per se*, a waiver of

his rights under the first judgment. But here was no fraud in the case. The plaintiff admits, in his bill, his knowledge, at the time, of the existence of the former judgment, and of its assignment to the defendant. The fact of his knowledge is also proved. The allegation of the plaintiff is, that he purchased, not in ignorance of the prior judgment, but in confidence that he should be enabled to hold the land free, and discharged from that judgment. Here was, then, no mistake in point of fact. According to the plaintiff's own showing, he was only under a mistake in point of law; and that mistake not being produced by any fraud in the defendant, is not sufficient, of itself, to affect the former lien, or the validity of the sale. The defendant (as we are at liberty to presume) might have previously communicated to the plaintiff all the requisite knowledge, or he might have been informed by others of the plaintiff's knowledge, and have deemed it useless or impertinent, to be reminding him of what he already knew. The case is by no means analogous to that of *Livingston v. Byrne*, (11 Johns. Rep. 555.,) to which the counsel referred; for there the party had, by public notice, promised a release of his rights to the purchaser; and the setting up, afterwards, a prior and secret deed of trust, was inconsistent with the notice, and a surprise upon the purchaser. It is a decisive fact, in this case, that when the plaintiff made the purchase, he *knew* that such a prior judgment existed, and it was *his* business to make further inquiry on the subject of that judgment, if such inquiry should become material. It was not incumbent on the defendant to tell the plaintiff that the former judgment would continue to bind the land, notwithstanding the purchase, for that was a legal consequence with which the plaintiff must be presumed to have been acquainted. Possibly each party was speculating at the time, the one in buying, and the other in selling, on the supposed ignorance of the other, as to the operation of the sale on the former judgment. In a moral point of view, the duty of disclosure of each other's opinion was mutual. The defend-

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ant has done nothing that amounts, in judgment of law, to a waiver of his lien, for here was no concealment of a fact of which the other party was ignorant; and a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts. I assume this as a settled principle of law and sound policy. The effect of mistake of the law, in different cases, and under various and special circumstances, has been often and deeply discussed by the writers on the civil law; and the text of that law, with *Cujas* and *Heineccius*, is to be found on one side, and *Vinnius*, *Domat*, *D'Aguesseau*, and *Pothier*, on the other, in respect to the question, whether money paid under a mistake of the law, and with knowledge of the facts, can be recovered back. But this case is even clear of that question. Here is a purchase fairly made, and, admitting all that is alleged, made under a mistake of the law only as to a collateral point which did not go to the sole consideration of the purchase; and the purchaser is seeking, under that pretence, not indeed to vacate the sale, but to devest the defendant of his rights. In such a case, the general doctrine which we find established must prevail, that every man is to be charged with a knowledge of the law. (*Doctor and Student*, 79. 151. 152. *Bilbie v. Lumley*, 2 *East*, 469. *Stevens v. Lynch*, 12 *East*, 38. 1 *Fonb. Eq.* 106. n. t.) In *Mildmay's case*, (1 *Co.* 177,) it was held, that ignorance of the law was no justification in an action of slander of title. It is a very dangerous plea, whether we apply it to the rules of civil conduct, or to duties of natural and moral obligation. In the *Lettres Provinciales* of *Pascal*, (Lett. 4.,) he refutes the lax morality of the *Jesuits*, by showing from *Aristotle*, to whom they had appealed, that though ignorance of the fact will render an action involuntary, yet that ignorance of the moral law is no admissible plea for breach of duty in matters that concern the moral conduct.

The binding nature of the purchase, in this case, subject to the prior lien, might be further strengthened, if it were necessary, from a consideration of the fact, that the plaintiff carried the contract of sale into effect by paying the purchase money, and receiving a deed, after he was informed, by the sheriff, that another execution under the first judgment was put into his hands.

I shall, accordingly, dismiss this bill, with costs.

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Decree accordingly.



HAMILTON against CUMMINGS.

Sept. 27th.

This court has power to order a bond or other instrument to be delivered up to be cancelled, whether such instrument is or is not void at law, or whether it be void on the face of it, or by matter shown by the proofs in the cause; but the exercise of this power rests in the sound discretion of the court, and is regulated by the circumstances of each particular case.

Where a bond was good on the face of it, but had been held by the defendant for 27 years, and he admitted that it was given on a trust which he ought not to disclose, and depended on a contingency which had not happened, though it might, by possibility, happen, the court ordered the bond to be delivered up and cancelled.

So, where a bond, conditioned to pay a certain sum, and good on the face of it, and on which a suit at law was pending; and the obligor had a good defence in equity, arising from matter *dehors* the bond, it was ordered to be delivered up.

THE bill stated, that the defendant, pretending to be lawfully possessed of a bond, made by *James Hamilton*, the father of the plaintiff, dated the 27th of *September*, 1794, conditioned for the payment of sixty pounds, had brought an action, at law, thereon against the plaintiff, as administrator of his father's estate, and the cause was at issue. That the defendant pretended to have another bond, executed by the

1815. plaintiff's father, for 800 pounds, which he refused to show.
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CUMMINGES. The plaintiff charged that both the bonds, if executed, were voluntary, and without consideration, or were given to indemnify the defendant for being bail in certain suits brought against him, and were to be given up and cancelled, if the defendant was not damnedified ; that the suits were all settled, and the defendant had been put to no cost or damage. The plaintiff set forth various facts relative to the bonds and the situation of the defendant, which are not material to state here ; and that the defendant was indebted to his father's estate ; and prayed that the defendant might pay the sums he owed, and an account, &c., and for a perpetual injunction against any proceedings on the bonds; and that they might be delivered up and cancelled, &c., and for general relief, &c.

The defendant, in his answer, admitted that he held the bond of the plaintiff's father for 60 pounds, and had commenced a suit thereon, &c. That the plaintiff's father, on the 22d of *September*, 1788, executed a bond to him, conditioned to pay 996 pounds, on the first of *January*, following, which he set forth ; that it was given on a special trust, of a secret and delicate nature, and was to be put in force on certain contingencies, which had not happened ; yet, it being possible that they might happen, he thought it his duty to keep the bond in his possession ; that he paid no consideration for the last-mentioned bond, and had no personal interest therein ; and denied that he ever threatened to put it in suit ; that the trust of this bond has no relation to the suit between the defendant and plaintiff ; and that the defendant is advised that it would be improper further to disclose it, and prayed the direction of the court therein. The defendant denied that he had, or pretended to have, any other bonds of the intestate, and if there were any they were paid. He denied that the bond for 60 pounds was voluntary, or given for indemnity for being bail for the obligor ; that he never was, to his best recollection, bail for the obligor ; but that the bond

was given for a debt justly due on settlement of accounts, and was still due. And he denied that he owed the intestate any thing, &c.

The cause being put at issue, several witnesses were examined on the part of the plaintiff, whose testimony related principally to certain papers in the plaintiff's possession, showing that the bond for 60 pounds was given by way of indemnity merely, and that the defendant had sustained no damage.

Witnesses were, also, examined on the part of the defendant, whose testimony related chiefly to the good character of the defendant, his situation, business, and connexion with the plaintiff's father, &c.

The rule for publication was passed, and the cause set down for a hearing, by consent, on written briefs or arguments, submitted to the court with the pleadings and proofs.

I. Hamilton, in person.

Burr, for the defendant.

THE CHANCELLOR. Upon the answer and proofs in this cause, the relief sought and claimed is, that the two bonds acknowledged to be held by the defendant, should be decreed to be delivered up and cancelled. The question, whether such a remedy can, or ought to be applied, leads to an interesting inquiry.

1. The defendant admits that he holds a bond, executed by the ancestor of the plaintiff, on the 22d of *September*, 1788, for the payment of 996*l.* on the first of *January* following; and that it was given upon a special trust, of a secret and delicate nature, which he does not think proper to disclose; and that it was to be in force only upon certain contingencies which have not yet happened, and, probably, never will; and that he paid no money or other consideration for it, and has no personal interest in it, nor has ever

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1815. pretended to put it in suit. After such a confession, it would be very unreasonable that the bond should be suffered to continue a dead weight upon the property that may have descended to the plaintiff. It is, however, not easy to extract from the books any precise rule by which the jurisdiction of the court is, in such cases, to be exercised. The bond, most probably, could not be enforced at law, though it appears on the face of it to be an absolute bond for the payment of money. The lapse of 27 years, if not most satisfactorily accounted for, would form of itself a conclusive bar to a recovery ; and the admissions in the answer must destroy its validity here, even if they cannot be received as a defence at law. Why, then, should it any longer exist to cast even a shade over the title to the assets of the ancestor ?

I have looked into the cases on the point of jurisdiction, and I have no doubt that the court has competent power to order the bond to be cancelled ; and the power is the more necessary since there is no such jurisdiction at law.

In *Minshaw v. Jordan*, (3 Bro: 18. n.,) a bill was filed to have a promissory note delivered up and cancelled, as obtained by fraud, and without consideration. The *Master of the Rolls* retained the bill, and allowed the defendant to proceed at law upon the note ; and the verdict being found against it, he then decreed that the note be delivered up to the plaintiff to be cancelled. But, afterwards, in *Ryan v. Macmath*, (3 Bro. 15.,) Lord *Thurlow* would not direct a note to be delivered up, though a recovery had been unsuccessfully attempted at law ; and he would not admit the rule in this general extent, that whenever one party had an instrument on which he could not maintain an action at law, he must be decreed to give it up, and he accordingly dismissed the bill, but without costs. Sir *Samuel Romilly*, in citing this case, in 13 *Ves.* 584., observed, that the decision was disapproved of, at the time, as the note was void, not upon the face of it, but from collateral circumstances ;

and in *Newman v. Milner*, (2 *Ves.* jun. 483,) notwithstanding this case of *Ryan v. Mackmoth* was mentioned, Lord *Loughborough* ordered a bill of exchange, avowedly given by one partner in the name of the firm, for his private debt, to be delivered up, with costs, without even waiting to have its validity tried at law; and he did it on the ground, that the evidence was clear and decisive against the bill, and that the payee took it, knowing it to be for a private debt, and that there was no need of a verdict to satisfy the conscience of the court. But the subsequent cases of *Franco v. Bolton*, (3 *Ves.* 368,) and of *Gray v. Mathias*, (5 *Ves.* 286,) are calculated to throw doubt once more on the exercise of this power. In the first of those cases, a bond was alleged to have been given for an illegal consideration, and the obligee had obtained a verdict at law. The bill was to have the bond delivered up; but it was, on demurrer, dismissed by Lord *Loughborough*, on the ground, that there was no necessity for the interposition of the court, as the matter could have been pleaded, and the bond rendered null, at law. In the other case, the bond was void on its face, as appearing to have been given *pro turpi causa*, but the *court of exchequer* refused a decree to deliver it up, and principally on the ground of the length and expense of such a remedy in equity, when the defence at law was irrefragable. The *Ch. Baron* observed, with some sensibility, that though equity might have a concurrent jurisdiction, it was not fitting, in that particular case, to exercise it, as the plaintiff had a full defence at law; and it was oppressive to seek, by a long and costly litigation in chancery, to have the bond delivered up, when, by the plaintiff's own showing, it was a mere nullity. In that case, the bond had never been sued at law, and the bill was dismissed, with costs.

The equity power was afterwards asserted by Lord *Eldon*, in *Bromley v. Holland*, (7 *Ves.* 3,) and he dwelt much on the question of jurisdiction, and did not concur in the decision in *Franco v. Bolton*. He seemed to think the

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question had become settled, by a series of decisions, in favour of the authority of the court to direct instruments to be delivered up, though they might be void at law. He admitted there was some degree of contradiction in the cases, but he inclined in favour of the jurisdiction, even if the question had been *res integra*; and though he could not say, if it was clear that no use could be made of the instrument, that was ground enough for the equitable jurisdiction, yet "it was not unwholesome that an instrument should be delivered up upon which a demand may be vexatiously made as often as the purpose of vexation may urge the party to make it." In *Jackman v. Mitchell*, (13 *Ves.* 581.) the equity jurisdiction was again freely exercised. The bond there was given to secure one creditor the deficiency of a composition, and was never communicated to the other creditors, and had never been put in suit. The bill charged the bond to have been thus taken against the policy of the law, and in fraud of creditors; and the counsel for the defendant, when speaking of the jurisdiction, observed, that if an instrument was void upon its face, the court would not assume jurisdiction and cancel it, because it was void at law; and that "there was no instance of a decree for delivering up a bond, appearing upon the face of it to be void." Lord Eldon expressly waived any opinion on that distinction as to jurisdiction, but said that the bond was bad, because it was proved, *aliunde*, that it was intended to be kept secret; and he accordingly decreed, that it be delivered up, and awarded costs against the defendant.

I am inclined to think, that the weight of authority, and the reason of the thing, are equally in favour of the jurisdiction of the court, whether the instrument is, or is not, void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded. It is every day's practice, as the counsel observed, in *French v. Connally*, (2 *Anst.* 454.,) to order instruments to be delivered up, of

which a bad use might be attempted to be made, at law, although they could not even there entitle the holders to recover. It is, indeed, not very apparent, why a doubt could have been started in some of these modern cases as to the general jurisdiction of the court, when we consider the uniform tenor and language of the more ancient decisions, and which do not appear to have turned upon the distinction whether the instruments were, or were not, void at law. In *Whittingham v. Thornburgh*, (2 Vern. 206.,) and *Goddart v. Garrett*, (*ibid.* 269.,) and *De Costa v. Scandret*, (2 P. Wms. 170.,) policies of insurance, procured by fraud, were ordered to be delivered up and cancelled, though the fraud was equally a defence at law. And in another case, (*Law v. Law, Cases temp. Talbot*, 140. 3 P. Wms. 391.,) Lord Talbot ordered a bond to be cancelled, and charged the defendant with costs, without deciding whether, or not, it was good at law. But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction. It may, sometimes, become essential to the perfect and tranquil enjoyment of private right, that this most important branch of equity power should be exercised in the one case as well as

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in the other; and it may be here observed, that in the case of *Law v. Law*, the whole consideration was spread out upon the bond, and that, as the case is reported in *Percy Williams*, the Lord Ch. was inclined to consider the bond a void at law as well as in equity, and yet he cancelled the bond without sending the parties to law. The learned counsel, therefore, in *Jackman v. Mitchell*, appear to me to have hazarded too much in their assertion that there was no such case to be found.

The bond now in question comes within that case, for it is good on its face, and void only from the facts disclosed by the defendant's answer. We can, consistently with the whole current of authority, direct it to be cancelled. It is the more proper to do so, because it is, at least, doubtful, whether the pretended secret trust, under which it was taken, and the failure of that trust, would be received as a defence at law. My impression is, that it could not. But, in this court, the evidence furnished by the answer is decisive. The defendant holds a bond for 27 years, and says it was given upon a trust which he ought not to disclose, and depends upon a contingency which has never happened, and which he says is only within the reach of possibility. Such a bond cannot be permitted to endure for ever, and we cannot recognise any trust which is not disclosed, and is, therefore, unknown. It is not convenient, or just, that such a bond should continue, with a pretension to the assets in the hands of the plaintiff. It might embarrass their application, or weaken their security, or poison their enjoyment. It is immoral for a person to retain a bond which is useless to him, and an annoyance to others.

This bond must, therefore, be delivered up, and cancelled.

2. The other bond, conditioned for the payment of 60 pounds, and on which a suit is pending at law, is shown, by the proof, to be no longer valid. It bears date on the 27th day of September, 1794, and is made payable on the 29th of the same month; and the answer of the defendant avers that

it was given for a debt justly due on a settlement of accounts ; and denies that it was given to indemnify the defendant for becoming bail in any suit whatever ; and that the defendant was never bail in any suit for the obligor. The answer further states, that one of the witnesses to the bond is dead, and that *William Hill*, the other witness, is living, and is a man of good repute. This cause was put at issue, and witnesses examined on each side, and publication passed by consent. In the course of examination, the plaintiff proves, by this same witness, that he was present at the execution of the bond ; and that he, with the other witness, (now dead,) at the same time, attested a receipt given by the defendant to the obligor, showing that the bond was given by way of indemnity to the defendant for becoming bail for the obligor. The receipt is made an exhibit in the cause, and proved by his witness ; and it is of the same date with the bond, and declares that the bond, which it duly specifies, was given as an indemnity to the defendant for being surety for the obligor, in a suit brought against him by one *Samuel Wood* ; and that if the suit was settled and discharged in due time, without any further damage, the bond was to be void. No damage is pretended to have been sustained. The defendant denies that he ever was bail for the obligor. As the receipt goes to contradict the express terms of the bond, and is not under seal, I apprehend it would not be admitted, at law, as a defence against the payment of the bond ; and as it forms a matter of defence *dehors* the bond, and is good in equity, it brings the case within the reach of all the decisions in favour of the exercise of the jurisdiction of this court ; and it becomes essential to justice that the court should interfere and protect the plaintiff from the claim set up at law.

I have not deemed it regular to take notice of the suggestion of the counsel for the defendant, accompanying his brief, (for the case was, by mutual arrangement and consent, argued on paper,) of a defect in the interrogatories on the part of the plaintiff, and of the delay of his solicitor

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to produce the exhibit. There is no motion before me on the subject, nor would it have been in season if it had been made; for even before the last term, publication passed by a rule entered by consent, and the cause was, by the like consent, set down for hearing at the last term. I shall, accordingly, decree, that both the bonds be delivered up to the register, or assistant register, and cancelled within 20 days after notice of this decree; and that the defendant be perpetually enjoined from prosecuting either of the said bonds at law; and that the defendant pay the costs which have accrued in the suit at law, and, also, the costs of this suit.

Decree accordingly.

Sept. 27th. DENTON AND OTHERS *against* JACKSON AND OTHERS.

After publication passed, and the cause set down for hearing, the deposition of a witness was allowed to be amended, on examination of the witness by the court, he being aged and very deaf, and a mistake made in taking down his testimony by the examiner.

MOTION to expunge some part of the deposition of one of the witnesses, examined on the part of the plaintiff, on a certificate of the examiner, that the witness applied to him, a short time before publication was passed, alleging a mistake in taking down his testimony. The examiner, also, certified that the witness was very deaf. The cause was set down for hearing: and the motion now was, that the witness, who was in court, and appeared to be aged, should be examined *ore tenus* by the court.

Riggs, in support of the motion, cited 2 P. Wms. 646. Dickens' Rep. 677.

Hoffman, contra, objected to any alteration of the original deposition, and urged that the correction, or explanation, should be made in a supplemental affidavit.

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THE CHANCELLOR. Applications of this kind must rest in discretion, and great caution is requisite to prevent abuse. The mistake suggested might easily happen from the age and great deafness of the witness. If the mistake exists, the deposition ought to be corrected, otherwise the witness would appear to contradict himself; and the cases cited appear to support this course of proceeding.

The motion must be granted.

The witness was, thereupon, sworn in court, and examined, and his deposition amended.

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MANNING AND OTHERS against *The Executors of*
MANNING.

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An executor, or trustee, is not entitled to *commissions*, or compensation for his services in the execution of his trust. Executors, or trustees, are chargeable with *interest* on trust moneys applied to their own use.

THE testator, *James Manning*, made his will on the 29th of November, 1808, and died the next day, leaving a considerable real and personal estate. By the will, his executors were empowered to sell all his real estate, except that on *York Island*. The defendants all acted as executors, and sold the real and personal estate, and collected the proceeds, after paying debts; and from time to time paid over to the plaintiffs, who are the widow and children of the testator, various sums as part of the estate; but the plaintiffs charged that considerable moneys still remain in the hands of the defend-

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ants, unaccounted for; and, particularly, that each of them retains a sum under pretence of its being due for *commissions*, or as a compensation for personal services, in executing the will, &c.

The bill prayed for an account, and general relief.

The defendants, in their answer, state, that the testator was a merchant of extensive business, and had many outstanding debts, difficult to be collected; and his children being infants, without a guardian to act for them, the defendants had a great deal of trouble in managing the estate and collecting the moneys, &c. That they had received, on account of the estate, 78,598 dollars and 25 cents, and had paid 77,024 dollars and 53 cents, leaving a balance of 1,573 dollars and 72 cents in their hands; and that there are still some outstanding debts to be collected. That the real estate was dispersed in different states, and the charge was in their hands about four years. That the testator left the executors no legacy, or any compensation for their trouble; and they submitted that they were justly entitled to, and ought to have, a *commission* of two and a half per cent., on 76,701 dollars, of the funds of the estate received and paid out by them; and the like commission on 51,782 dollars, part of the amount received by them. They admitted that *Jeremiah Manning*, and *Robert Manning*, two of the defendants, had, respectively, used part of the moneys received by them, for which, however, they allowed *interest* to the estate; but which, they think, ought not to be allowed. *William F. Manning* admitted that he retained in his hands 129 dollars and 26 cents, being *commissions*, of 5 per cent., for his services in taking charge of a farm in *New-Jersey*, owned by him and the testator jointly. *Jeremiah Manning* admitted that he retained in his hands 720 dollars and 15 cents, as a compensation for his services to *January*, 1813, besides the *interest* above mentioned, amounting to 420 dollars and 64 cents. *Robert Manning*, also, admitted, that he retained 613 dollars and 50 cents, besides the *interest* due from him of 116 dollars and

50 cent., which amount he claimed as a compensation for his services.

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Slosson, for the plaintiffs. He cited *Robinson v. Pett*, 3 P. Wms. 249., and *Gould v. Fleetwood*, *id. n. p.* 251. *Chetham v. Audley*, 4 *Ves. jun.* 72. *Harvey v. Blakeman*, 5 *Ves. jun.* 696.

Baldwin, for the defendants. He cited *Bonithon v. Heckmore*, 1 *Vern.* 316. 4 *Ves.* 75. *Brown v. Lilton*, 1 *P. Wms.* 140. 1 *Pennington's N. J. Rep.* 44. 3 *Binney's Rep.* 557. 1 *Wash. Rep.* 250. *Ayliff v. Murray*, 2 *Atk.* 60. *Ellison v. Airey*, 1 *Ves.* 111. *Swinburne*, 860. 11 *Vin. Abr.* 483. 1 *Vernon*, 197. 1 *Bro. C. Rep.* 359. 12 *Ves.* 391. 13 *Ves.* 592. 2 *Atk.* 106. 151. 603. *Swinburne*, 154. 251. 7 *Ves.* 96, 97. *Toller's Law of Executors*, 324.

THE CHANCELLOR. The executors are called on to render an account of their trust; and they set up a claim to a commission of 5 per cent., as a compensation for their care and trouble in the management of the estate; and they, likewise, contend, that they ought not to account for interest on moneys belonging to the estate, and which they made use of for their private purposes.

1. The claim of an allowance has been pressed upon the court with much zeal, as if the denial of it would be extremely unjust, and as if this court was at liberty to deal with established rules just as it pleased. This very point was one that arose in the case of *Green v. Winter*,^{*} and it was, then, * *Anst.* p. 26. considered as a settled rule in the English chancery, that no such allowance was admissible, unless it rested upon contract, or was given by the will. The rule there must be the rule here; for I take this occasion to observe, that I consider myself bound by those principles, which were known and established as law in the courts of equity in

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England, at the time of the institution of this court; and I shall certainly not presume to strike into any new path, with visionary schemes of innovation and improvement; *via antiqua via est tuta*. It would, no doubt, be, at times, very convenient, and, perhaps, a cover for ignorance, or indolence, or prejudice, to disregard all *English* decisions as of no authority, and to set up as a standard my own notions of right and wrong. But I can do no such thing. I am called to the severer and more humble duty of laborious examination and study. It was Lord *Bacon* who laid it down as the duty of a judge to draw his learning from books, and not from his own head. This court ought to be as much bound as a court of law, by a course of decisions applicable to the case, and establishing a rule. As early as the time of Lord Keeper *Bridgman*, it was held that precedents were of authority; and that it would be "very strange and very ill" to disturb a rule in chancery which had been settled. (1 *Mod.* 307.) The system of equity principles, which has grown up and become matured in *England*, and chiefly since Lord *Nottingham* was appointed to the custody of the great seal, is a scientific system, being the result of the reason and labours of learned men for a succession of ages. It contains the most enlarged and liberal views of justice, with a mixture of positive and technical rules, founded in public policy, and indispensable in every municipal code. It is the duty of this court to apply the principles of this system to individual cases, as they may arise; and, by this means, endeavour to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions at home.

The Master of the Rolls, Sir *Joseph Jekyll*, disclaimed any discretionary power in the court, sometimes ignorantly imputed to it, to follow the private affections, or any arbitrary notions of abstract justice, instead of the established maxims of law and equity. Though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when

it is asked, *Vir bonus est quis?* The answer is, *Qui consulta Patrum, quia Leges, Juraque servat;* (Sir J. Jekyll, in 2 P. Wms. 753. See also 3 P. Wms. 411.;) and it may be laid down as a certain truth, that the *English* system of equity jurisprudence forms an important and very essential branch of that "common law," which was recognised in the constitution of this state. If it were not so, this court would be a dangerous tribunal, with undefined discretion, and without either science or authority to guide it. The *English* decisions are, undoubtedly, the most authentic evidence of the *English* common law; and the dignity or independence of our courts is no more affected by adopting these decisions, than in adopting the *English* language; or than the independence of *France* or *Holland* is wounded by following, as they do, the civil code of the ancient *Romans*.

Our business, then, as questions arise, is to discover what rule, if any, has been established by the courts in this state, and if none, then what was the existing rule in the *English* system of equity at the commencement of our revolution. And while engaged in this inquiry, we are not to blind our eyes against human knowledge, but it is incumbent on us to examine the several authorities, whether they be ancient or modern, whether they be before or since the revolution, whether they be foreign or domestic, which may tend in any degree to ascertain, explain, or illustrate, the point under consideration. When we have been able to deduce from them, with sufficient precision, the true, genuine rule of equity, that rule becomes the law of the case, and the case a precedent for the future. (a)

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(a) In *Bond v. Hopkins*, (1 Schoale & Lefroy, 428, 429.) Lord Redesdale observed, "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and

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With this explanation on the subject of cases, (and to which I have been led by the language of some decisions in this country,) I return to the point before me, and I think it is not to be denied that the law is *settled* against the claim of a trustee to compensation. The decisions have remained steady and uniform for a century and a half, and the rule applies not to executors merely, but equally to trustees of every description. The only unsettled point seems to be, whether even an agreement with the *testator que trust*, for an allowance made after the creation of the trust, or the death of the testator, would be recognised as binding. "I will not say," observes Lord Hardwicke, "that the court will set aside such an agreement, if fairly and openly made, though there is no instance where the court has confirmed such a bargain." A trust is regarded, in chancery, as a matter of honour and conscience, and undertaken with humane, or friendly, or charitable, and not with mercenary, views. It is not necessary to go through the cases at large, or repeat what I have said on a former occasion. A general reference to the authorities must be sufficient. (*How v. Godfrey, Rep. temp. Finch*, 361. *Hethersell v. Hales, Rep. in Ch. vol. 2. p. 83. Bonithon v. Hockmore, 1 Vern. 316. Scattergood v. Harrison, Moseley, 128. Robinson v. Pett, 3 P. Wms. 248. Gould v. Fleetwood, n. ib. Ayliffe v. Murray, 2 Aik. 58. The Charitable Corporation v. Sutton, 2 Aik. 406. In the matter of Annesley, Amb. 78. Ellison v. Sirrey, 1 Ves. 111. Chetham v. Lord Audley, 4 Ves. 72. Fearns v. Young, 10 Ves. 184.*)

The distinction attempted to be raised between a mere executor, and one partaking rather of the character of an agent or bailiff, is not applicable to the case. The distinction might, with equal or more propriety, have been made in

| may thus illustrate or enlarge the operation of these principles ; but the principles are as fixed and certain as the principles on which the courts of common law proceed."

How v. Godfrey & White, which was one of the earliest cases, and in which the general rule was established by Lord Nottingham himself. The defendants in that case, were appointed by a nuncupative will to take care of the estate for the infant children of the testator, and they took out administration with the will annexed ; and by virtue thereof, and as guardians, they possessed themselves of the whole estate, real and personal. If the idea of acting as agent or bailiff, rather than as executor, was applicable to any case under a will, it would have been so to that, and yet the Chancellor rejected their demand of an allowance for their care and trouble. The same distinction was urged, and equally in vain, in *Robinson v. Pett*, where the services were alleged to be very extraordinary, but the party still acted under a trust created by will ; and it was in that case that Lord Talbot laid down the rule in very general and emphatic terms. He said it had long prevailed, and was a reasonable rule, and one which tended to prevent the trust estate from being loaded and eaten up by a charge voluntarily assumed. It is a rule founded in the same equitable policy of closing the door to temptation, abuse, and fraud, with that other rule forbidding a trustee to become a purchaser, for his own benefit, of the trust estate. And if the rule applied with more force and propriety to one kind of trust than another, I should think it was that of an executor who gives no security, and who is selected by reason of some special and sacred confidence, resulting from the ties of kindred or friendship, and charged by the testator, in his dying moments, with interests of the nearest human concern, and which he is on the eye of renouncing for ever. The request of the testator, in such cases, is the *supplication of a friend* :

*Miserae hoc tamen unum
Exequere—michi.*

It appears to be the practice in several of the *United*

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States, to allow a commission of so much *per centum* to executors and other trustees. (1 *Wash. Rep.* 246. 4 *Hen. & Munf.* 415. 1 *Munf.* 150. 3 *Birney*, 457.) But this practice cannot be received here as authority, however respectable the source; for it is not founded upon any different construction of the *English* law, but upon local usages or statutes, which have confessedly changed the *English* rule. I am not responsible for the justice of that rule. I only declare the law as I find it to be settled; and if the rule was admitted to be, according to the language of one of the southern chancery cases, "a monstrous rule," I should not feel myself at liberty to say, as that case does, "so far as I can go, I shall blot it out for ever." (a) It is the province of the legislative, and not of the judicial power, to change the law; and our constitution has auspiciously declared, that the common law of *England* (in which I include, of course, the equity system) "*shall continue the law of this state*, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same."

Nor does the rule strike me as so very unjust, or singular and extraordinary; for the acceptance of every trust is voluntary and confidential, and a thousand duties are required of individuals, in relation to the concerns of others, and particularly in respect to numerous institutions, partly of a private and partly of a public nature, in which a just indemnity is all that is expected and granted. I should think it could not have a very favourable influence on the prudence and diligence of a trustee, were we to promote, by the hopes of reward, a competition, or even a *desire*, for the possession of private trusts, that relate to the moneyed concerns of the helpless and infirm. To allow wages or commissions for every alleged service, how could we prevent abuse? The infant or the lunatic cannot watch their own interest. *Quis*

(a) *Miller v. Beverley*, 4 *Henning & Munf. Virg. Rep.* 415—419. per Chancellor Taylor.

custodiet ipsos custodes? The rule in question has a sanction in the wisdom of the *Roman* law, which, equally with ours, refused a compensation, and granted an indemnity to the trustee of the minor's estate. The maxim in that law was, that *lucrum facere ex pupilli tutela tutor non debet*; and the tutor or curator was entitled only to his reasonable and just expenses incurred in behalf of the estate, such as travelling charges, costs of suit, &c., unless a certain allowance was granted by the person by whom he was appointed. *Sumpuum, qui bona fide in tutelam, non qui in ipsos tutores sunt ratio haberi solet: nisi ab eo, qui eum dat, certum salarium ei constitutum est. Item sumpitus litis tutor reputabit, et viatica, si ex officio necesse habuit aliquo excurrere vel proficisci.* (*Dig.* 26. 7. 33. *Idem.* 26. 7. 58. *Idem.* 27. 3. 1. 9.) It is probable that this same principle, which we find in some, has been infused into the municipal law of most of the nations of *Europe*, because most of them have adopted the civil law. (*Domat.* b. 2. tit. *Tutors*, sect. 2. pl. 3. sect. 3. pl. 35. *Ersk. Inst.* b. 1. tit. 7. sect. 31, 32.)

The same rule was known in the early ages of the common law, and applied to the guardian in socage. He was entitled only to his allowance for his reasonable costs and expenses, when called to render an account of the guardianship of the estate of the ward. (*Litt.* sect. 123.) And this was the provision in the statute of *Marlbridge*, (52 H. III. c. 17.,) declaring the duties of the guardian in socage, *salvis ipsis custodibus rationabilibus misis suis*.

2. As to the next point, whether the executors shall be charged with interest on the moneys which they admit to have been applied by them to their own use, and on which they had, at one time, admitted themselves to be chargeable with interest, there does not appear to me to be room for a question either on reason or authority. If the executor applies the moneys of the estate to his own use, he ought to pay interest, because he ought not to make a gain out of the estate; and it is his duty to manage it for the exclusive

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1815. benefit of the *cestuy que trust*. It is sufficient to refer to the cases of *Ratcliffe v. Graves*, (1 *Vern.* 196.,) *Newton v. Bennet*, (1 *Bro.* 359.,) and *Piety v. Stace*, (4 *Ves.* 620.,) to show that this is a settled rule of the court.

~~Executors keeping part of a fund, for commissions, and litigating in favour of their claim were decreed to pay costs.~~

I shall, accordingly, decree, that the defendants are not entitled to any commission, and that they must account for the interest which they have heretofore allowed to the estate; and that, as they have undertaken, in favour of

their own private claim, to litigate with the plaintiffs upon these two points, and which have been long settled in the law, it is just that they should do it at their own expense, and be chargeable with the costs of this suit; and this is the practice in such cases. (1 *Bro.* 359. 3 *Bro.* 433. 1 *Ves.* jun. 294. 4 *Ves.* 620.)

Decree accordingly.

October 6th.

#### EAGLESON against SHOTWELL.

If, on application for a loan of money, the sale of shares in an insurance company, at *par*, is made the condition of the loan, when the shares are, in fact, below par, the transaction is *usurious*.

And if it be impossible to ascertain the cash value of the shares, the company having failed, the sale will be rescinded, and the mortgage taken by the lender, ordered to stand as security only for the *cash* lent, and the interest thereon.

*WILLIAM EAGLESON*, deceased, the husband of the plaintiff, in June, 1812, being in want of money, applied to the defendant, who agreed to lend him 2,000 dollars, on bond and mortgage, provided he would take, also, four shares of the stock of the *Commercial Insurance Company*, at *par*, or 250 dollars for each share. The bill charged that the stock was then worth only 125 dollars a share, and was a mere colour for a *usurious* loan; but the defendant taking advantage of the necessities and weakness of *W. E.*, the

loan was effected ; and a bond was, accordingly, executed, conditioned to pay the defendant 3,000 dollars, with interest, in one year ; for which a mortgage was given on two lots in New-York ; and the defendant advanced the 2,000 dollars in cash, and transferred the four shares of stock.

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*W. E.*, on the 14th of June, 1813, by his last will, devised the principal part of his property to his wife, the plaintiff, and made her executrix. The defendant having advertised the lots for sale, under the power contained in the mortgage, the plaintiff prayed for an injunction to stay the proceedings, (which was granted,) and for relief generally.

The defendant, in his answer, stated, that though he was acquainted with the concerns of the *Commercial Insurance Company*, he was not able, in June, 1812, to ascertain the value of the stock, as it depended on the result of certain large claims for losses, by seizures under the *Berlin and Milan decrees*, &c. That he had no communication with *W. E.* ; but *Robert Jaques* applied for the loan of 2,000 dollars, and the defendant offered him that sum, if he would also take four shares of the stock of the said company, at par, otherwise he declined lending the money. That *Jaques*, after taking time to deliberate and make inquiry as to the value of the stock, acceded to the terms of the loan ; which was, accordingly, effected, the money paid, and the bond and mortgage received, through the hands of *Jaques*. The defendant denied all design to oppress, or take usury, &c.

The cause being at issue, and considerable proof taken, it was set down for hearing in June last, when an order of reference to a master was made. It appeared from the proofs, that the defendant was one of the *directors* of the *Commercial Insurance Company*, at the time of the loan of the money and sale of the stock.

On the coming in of the master's report, the cause was brought on to a hearing. The master (who had been ordered to ascertain and report the *cash value* of the stock of the

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*Commercial Insurance Company*, on the 27th of June, 1812, with the interest from that time, what payments had been made, and the amount now due, &c.) reported, that he could not, from any cash sales, ascertain the *cash value* of the insurance shares ; that, in June, 1812, they were below par, but how much less he could not say. From the proofs taken before him, which he reported, it appeared that the *Insurance Company* failed some time after the transfer of the shares by the defendant to *W. E.* He, also, reported some payments for interest and rents received by defendant, who had taken possession of the mortgaged premises.

*Baldwin*, for the plaintiff.

*Slosson*, contra.

**THE CHANCELLOR.** It is admitted by the answer, that the sale of the shares, at par, was made a condition of the loan of the 2,000 dollars ; and, as the defendant was a director of the insurance company, at the time of the sale, he must have known of the embarrassed circumstances of the company, and that the stock was, at the time, of doubtful credit, and below par. This fact is established by the master's report ; and it was oppressive, and tended to extortion and usury, to make the acceptance of the shares, at par, a condition of the loan. If such contracts are to be supported, the provisions of the statute against usury would be eluded, and become of no avail. Selling stock at 75, to a person applying for a loan of money, when the price of stock, at the time, was only 73, was held, in *Doe v. Barnard*, (1 *Exp. Rep.* 11.,) to be clearly usurious. It is impossible to ascertain what the shares were worth at the time. There were no sales of them ; and the few which have since been made, appear not to have been in the usual and ordinary course of business. They show that the stock never had, afterwards, any market price which approaches, in any degree, near to their nominal value. It is impossible, then, to fix any deter-

minate value on them ; and the only course to be adopted is, to rescind the sale altogether, as being made in fraud of the statute. This course is recommended equally by policy and justice.

I shall, accordingly, decree, that the shares be retransferred by the plaintiff to the defendant, and that the mortgage stand as a security only for the 2,000 dollars, with interest thereon ; and that the defendant be at liberty to proceed to the sale of the mortgaged premises, only for the balance of principal and interest due on the sum actually loaned, together with the costs of such proceeding ; and that the defendant pay the costs of this suit, except that part of the inquiry before the master, which related to the rents and profits of the mortgaged premises while in the possession of the defendant, and on which inquiry the defendant has not been found in default.

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v.  
Woodhull.

Decree accordingly.

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WOOSTER AND OTHERS *against* WOODHULL.

October 7th.

A defendant, who has suffered the bill to be taken *pro confesso*, and a decree, by default, to be entered against him, may, under the special circumstances of the case, be let in to a defence, on terms ; it resting in the sound discretion of the court to relieve the party, or not, from the consequences of his default.

But where there had been gross negligence on the part of the defendant, and the principal and most material witness of the plaintiff had died since the bill was filed, the court refused to relieve the defendant, as opening the decree would produce irremediable injury to the plaintiff.

THE petition of the defendant stated, that on the 1st of February, 1798, he obtained a judgment, in the supreme court, against George W. Cook, for 1,600 dollars ; that in 1813, he sued out execution on the judgment, and was pro-

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ceeding to sell the lands of *Cook*, which were bound by the judgment, situate in *Norway*, in the county of *Herkimer*, when the plaintiffs, in *August*, in 1813, filed their bill in this court, stating that they were the owners of the land, having acquired a title under *Cook*, since the judgment; and charging that the judgment had been paid and satisfied; that the judgment had been revived by a *scire facias* awarded against, and served upon, *Cook*, personally, who is insolvent, and not upon the ter-tenants; and the bill prayed for a perpetual injunction, &c. That the *subpoena* to appear, &c., was served on the defendant, who employed a solicitor to appear and prepare an answer for him, and for which the defendant gave him the necessary instructions. That the answer was drawn and sworn to, and had never been filed; but why it was not done in proper time, the defendant did not know, having recently discovered the fact; that the answer was not sworn to until after the perpetual injunction had been awarded, but before the defendant, or his solicitor, knew of a decree by default; that the decree was never served on him or his solicitor; that, a short time before the last *June* term, he obtained a copy of a decree, which appeared to have been entered by default, the 30th of *April*, 1814, and by which the defendant was perpetually enjoined from proceeding on his judgment against the real estate of *Cook*; that there was no decree for costs; but, in the autumn of 1814, a taxed bill, to the amount of 90 dollars and 20 cents, was demanded of him, which he paid; that the judgment of the defendant is legal, and his debt, being 800 dollars, with interest, will be lost, unless the amount can be levied on the lands of *Cook*; and that he has a good defence to the bill, &c. The petitioner prayed that the decree, entered by default, might be vacated, and the defendant be let in to make his defence; and that the costs which he had paid should be refunded.

*T. S. Wooster*, one of the plaintiffs, in his affidavit, stated, that *William H. Cook*, the principal, and a very mate-

rial, witness for the plaintiffs, who was living at the time the bill was filed, had lately died; that if the defendant had put in an answer to the bill, according to the course of the court, the testimony of that witness might have been taken; and that, if the decree should be opened, great and manifest injustice would be done to the plaintiffs, for want of that testimony. It appeared from the affidavit of the solicitor of the plaintiffs, that the rule for the defendant to appear and answer was entered the 27th of *August*, 1813, after personal service of the *subpæna*; on the 21st of *October*, 1813, the bill was taken *pro confesso*, for want of appearance and answer, and on the 30th of *April*, 1814, a final decree was entered; that, on the 1st of *October*, the costs in the cause were taxed, and the bill presented to the agent of the defendant on the 20th of *October*, who requested that the decree, by default, might be waived, which was refused; that, soon after, the solicitor of the defendant applied to have the default waived, saying he had been employed to draw and file the answer, but had neglected to do it; that, on the 5th of *November*, 1814, the defendant's agent paid the costs; that he, the solicitor of the plaintiffs, did not know, until *September*, 1815, that the decree was silent as to the costs.

*Riggs*, in support of the petition, cited 1 *Dickens' Rep.* 61. 131. 145. 298. 2 *Dickens' Rep.* 782. *Ambler*, 89. 2 *Bro. C. C.* 279.

*Wells*, contra.

**THE CHANCELLOR.** The interference of the court, to relieve a party from the consequences of his default, must depend upon sound discretion, arising out of the circumstances of the case. There is no general and positive rule on the subject; and Lord *Thurlow* observed, in one case, (*Williams v. Thompson*, 2 *Bro.* 279,) that if a defendant comes in after a bill has been taken *pro confesso*, upon any

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reasonable ground of indulgence, and pays costs, the court will attend to his application, if the delay has not been extravagantly long. If the indulgence be great and frequent, there is danger of abuse of the precedent for the purposes of delay. This objection struck Lord Hardwicke with much force in the case of *Cunningham v. Cunningham*; (*Amb. 89. Dickens, 145.*;) and he directed precedents to be searched, on a similar application, where the defendant applied for a re-hearing, two years after a decree, which, on his not appearing at the hearing, had been made absolute. He said it was a question on which side the greatest inconvenience would lie; and he, finally, opened the cause in that case, on payment of the costs of the default, and of all subsequent proceedings. Several other cases were referred to by the counsel who made this motion, in which the party, whether plaintiff or defendant, who had made the default at the hearing, and who had, thereby, suffered his bill to be dismissed, or a decree to be made absolute against him, was relieved upon the usual terms, of payment of costs. (*Robson v. Cranwell, Dickens, 61. Kemp v. Squire, Dickens, 131. Fry v. Prosser, Dickens, 298. Ferran v. Waite, Dickens, 782.*)

I should have been inclined, under these authorities, to have let in the defendant upon terms; but there is one fact in the case, that puts the inconvenience wholly on the other side, and shows, that the gross neglect of the defendant has deprived the plaintiffs, for ever, of very material testimony to support the charge in their bill of the payment of the judgment. This question of payment involves the whole merit of the controversy, and, since the default, the principal witness in support of the bill has died. Had the defendant put in his answer according to the course and practice of the court, the testimony of this witness might have been procured. It is impossible, now, to relieve the defendant, without producing irretrievable injury to the plaintiffs. The inexcusable neglect of the defendant might, thus, be the very means of gaining his cause. Such a consequence can-

not be endured ; and the application to vacate the decree, and let him in to defend, must be denied.

But as the decree was silent as to costs, they were not recoverable, and they have been taxed and taken by the plaintiffs in their own wrong. They must be refunded ; but the plaintiffs are entitled to the costs of this motion ; and such costs are to be first deducted out of the amount paid to the plaintiffs' solicitor, and the balance only returned to the defendant.

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v.  
HOYT.
 

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Order accordingly.

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GELSTON AND SCHENCK against HOYT.

October 14th.

A decree of a court of competent jurisdiction, on the point at issue before it, can only be reviewed in the regular course of appeal. The decree of a court of peculiar and exclusive jurisdiction is conclusive on all other courts. As where a vessel was seized and libelled in the district court of the *United States*, as forfeited, for being fitted out, in violation of an act of congress, to be employed in the service of a foreign state, to wit, that part of the island of *St. Domingo* under the government of *Petion*, to commit hostilities on the subjects of another foreign state, to wit, that part of the same island under the government of *Christophe*, with whom the *United States* were at peace ; and the district court dismissed the libel, and ordered the vessel to be restored to the claimant, and refused a certificate of probable cause of seizure ; this decree was held conclusive as to the lawfulness of the seizure. If a bill seeks discovery in aid of the jurisdiction of a court of law, it must appear that such aid is clearly necessary, and the discovery material to the defence ; for where the facts depend on the testimony of witnesses, and the court of law can compel their attendance, this court will not interfere.

*It seems* that this court will not sustain a bill of discovery, and an injunction, merely to procure such admissions by the party as might be used in mitigation of damages, in an action of trespass, at law, unless, perhaps, in very special cases.

It belongs to the *government* of the country to declare, whether it will consider a colony that has thrown off the yoke of the mother country as an independent state ; and, until government has decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged.

MOTION to dissolve the injunction granted by the mas-

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ter in this cause, on the matter of the bill only, and before answer.

The bill stated, that *Gelston*, as collector of the customs in *New-York*, and *Schenck*, as surveyor of the port, on the 10th of *July*, 1810, seized the ship *American Eagle*, &c., as forfeited to the *United States*; that she was libelled, in the district court of the *United States*, for the district of *New-York*, by the attorney of the *United States*; that the libel alleged that the ship, on the 1st of *July*, 1810, was fitted out and armed, or attempted to be fitted out and armed, with intent that she should be employed in the service of a foreign state, to wit, of that part of the island of *St. Domingo* under the government of *Petion*, to commit hostilities upon the subjects of another foreign state, with whom the *United States* were then at peace, to wit, of that part of the said island under the government of *Christophe*, contrary to the statute, &c.; (see *act of Cong. 5th of June, 1794. Laws of U. S. vol. 3. p. 88. 3 Cong. sess. 1 ch. 50. s. 3.*;) by reason whereof the said ship became forfeited, &c. That, on the 7th of *November*, 1810, the defendant put in an answer and claim, under oath, in the district court, alleging that he was a citizen of the *United States*, and sole owner of the said ship, &c.; that he purchased her, *bona fide*, for a valuable consideration, and ignorant of any cause of forfeiture, and denied that the ship was fitted out and armed, or attempted to be fitted out and armed, with intent to be employed in the service of any foreign state whatsoever. That, on the 12th of *August*, 1812, the cause was heard before the district court, and, on the 24th of the same month, a decree was pronounced by that court, that the libel should be dismissed, and the vessel and her equipment be restored to the defendant; and that a certificate of probable cause of seizure ought not to be granted. That the defendant, afterwards, brought an action of trespass against the plaintiffs, in the supreme court of *New-York*, in which they had laid their damages, by means of the seizure and detention of the vessel, to

200,000 dollars, which cause was, then, at issue; the bill further stated, that *James Gillespie*, on the 14th of July, 1809, contracted for the purchase of the ship, with her then owners; and that *Gillespie*, in making the purchase, was the agent of *Petion*, &c. That, by arrangement among the agents, the defendant was to become the ostensible purchaser of the vessel, instead of *Gillespie*, but for the use of *Petion*; and that, at the time, *Petion* applied to *A. Kane*, of *Port-au-Prince*, for a loan of money, who, by bills drawn on *New-York*, in favour of *Dawson*, the agent of *Petion*, advanced 20,000 dollars, which bills were accepted and paid; and the sum of 12,800 dollars, part of the money, was paid by *Gillespie* to purchase the vessel; that other large sums were advanced, in produce, &c., by *Petion*, and his agents, towards the equipment of the vessel, &c. That they believed that, by an arrangement among the agents of *Petion*, the defendant was to become the ostensible purchaser of the vessel, instead of *Gillespie*; and the vessel was, accordingly on the 18th of January, 1810, transferred to the defendant for that purpose; that the defendant had declared that he purchased the vessel for *Petion*.

The plaintiffs further charged, that the defendant was not the *bona fide* or only owner of the vessel at the time of the seizure; but that the vessel was purchased and equipped by *Gillespie* and the defendant, as agents of *Petion*, and for his benefit; and that it was intended that the vessel should be fitted out and employed in violation of the laws of the *United States*, &c. The bill, also, contained the usual allegation, that the plaintiffs were remediless at law; and they prayed that the defendant might make full answer and discovery, &c., and set forth all contracts made by him, or any other person, on his account, with *Petion*, or any other person, on his account; and that he be enjoined from proceeding to trial of the suit at law; and, if the premises be established, that he be perpetually enjoined, &c.

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*Emmet* and *Colden*, in support of the motion. They cited *Imlay v. Sands*, 1 *Caines*, 566. 4 *Cranch's Rep.* 272. 1 *Edw. Adm. Rep.* 1. 2 *Bro. C. C.* 319. 4 *Bre. C. C.* 480.

*Wells* and *Baldwin*, contra.

**THE CHANCELLOR.** I have carefully examined and considered the contents of the bill, and I cannot perceive any sufficient ground for retaining the injunction. This is not a bill of discovery, in the strict and technical sense of the term. It is no more a bill of discovery, than every other bill seeking relief, and which calls upon the defendant to disclose by answer, the circumstances of the plaintiff's case as preparatory to such relief. This bill seeks to transfer the jurisdiction of the suit at law to this court, and to have the merits of the case discussed, and finally decided here, and the suit at law perpetually enjoined.

The first question that then arises is, whether the bill shows a right or title to relief in this court. I intimated an opinion upon the argument, that the bill failed in showing any right to relief, and my subsequent reflections have more and more confirmed that opinion. I am concluded, by the decree of the district court, that the vessel was not liable to seizure and forfeiture, under the laws of the *United States*, and that question cannot be re-examined here. The decree of every court of competent jurisdiction, on the point in issue before it, can only be reviewed in the regular course of appeal; and, as long as it continues in force, the decree, if it be the decree, as it is here, of a court of peculiar and exclusive jurisdiction in the case, is conclusive upon all other courts. It is quite unnecessary, therefore, to consider whether the governments of *Petion* and *Christophe*, in the island of *St. Domingo*, were *foreign states*, within the purview of the act of congress, under which the seizure was made, because that question becomes perfectly immate-

rial, if we are concluded, by the decision of the district court, from opening the question of the lawfulness of the seizure.

I should have no difficulty, however, if the question was properly before me, in declaring, that, until those chiefs are recognised as independent powers by the government of this country, to whom is intrusted the control of our foreign relations, the courts are bound to look to the ancient state of things, and to regard them as belonging to *France*. The judicial opinions referred to upon the argument, would, of themselves, very much conduce to put this point at rest.

The bill shows further, that the district court refused to grant to the plaintiffs a certificate that there was probable cause for the seizure; consequently, a suit at law for the unlawful seizure was well commenced; and there is no equity charged that can defeat that suit.

The discovery is not, then, wanted for the purpose of final relief here. This court can grant no such relief.

But it is contended, that the discovery, by the defendant's answer, of the matters charged in the bill, may become material on the trial at law, in mitigation of damages; and this leads us to consider whether this bill contains sufficient ground to call for a discovery for such a purpose; and, if it does, then whether that purpose be sufficient.

If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. If a court of law can compel the discovery, a court of equity will not interfere; and facts which depend upon the testimony of witnesses can be procured or proved at law, because courts of law can compel the attendance of witnesses. It is not denied, in this case, but that every fact material to the defence, at law, can be proved by the ordinary means, at law, without resorting to the aid of this court. The plaintiffs did not come here for any such aid, and it ought not to be afforded unless they call for it, and show it to be necessary. I should presume, from the bill itself, that every material fact relative to the ownership of the vessel could be commanded without

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resorting to this court ; and such trials at law are not to be delayed, and discoveries required, when the necessity of such delay, and discovery is not made to appear. This would be perverting and abusing the powers of this court. Unless, therefore, the bill states, affirmatively, that the discovery is really wanted for the defence at law, and, also, shows that the discovery might be material to that defence, it does not appear to be reasonable and just that the suit at law should be delayed. The bill is, therefore, defective and insufficient in this point of view.

But supposing the bill did state that the discovery sought for was material to the defence, and could only be procured from the defendant's answer, the question would then occur, whether that discovery would be material in this case. As the bill might possibly be amended, or a new bill framed so as to meet the point, it will be convenient to the parties to consider the present bill as if it actually contained all those requisite allegations.

No discovery sought by the bill can amount to a justification at law. If it be admitted that there was probable cause for the seizure, that probable cause, without a certificate, would be no justification. The rule of law on this point is settled. (*Inlay v. Sands*, 1 Caines' Rep. 566.) The proof of the facts charged, if material or admissible at all, could only be so in mitigation of damages ; and I think it is a very important question, whether this court is to sustain bills of discovery and process of injunction, merely for the purpose of procuring admissions that might be used to mitigate damages. I should not incline to admit such a practice in general terms ; it might soon become vexatious and intolerable. The cases ought, at least to be *special*, in which the certain bearing of the proof upon the case ought to appear, and some rule or test afforded by which the pertinency and materiality of the testimony could be ascertained. But without attempting, at present, to lay down any general rule on this point, I am not able to perceive how any of the

facts charged in this bill could become material to the defence in any point of view. The plaintiffs have committed a *tort* in seizing and detaining the defendant's vessel, and they must answer for the actual damages which he sustained. How can it affect the question of damages, whether the defendant was owner in his own right, or as trustee for another? Whoever may be the person beneficially interested, as owner, the damages are the same; and if impartial justice takes place, as we are to presume it will, the amount assessed will be the same. The defendant must make out a right or title to the action, or he will not recover; and whether he recovers for himself alone, or in part, or in whole, for any other person, is a question between him and that person, and not between him and the plaintiffs. I am not to speculate upon facts and circumstances as they might possibly operate upon the feelings and prejudices of jurors. I am only to inquire and adjudge what facts can, materially, and upon legal principles, control the damages on the trial at law, under the direction of a discreet and intelligent court. Without some such rule for the exercise of the judgment, we should be left to wander into the region of imagination and dreams.

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v.  
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In this view of the case, I cannot perceive that the fact, whether *Petion* was, or was not, the *cestuy que trust* of that vessel and her equipment, can be material in estimating the damages incurred by the unlawful seizure. The moment the trespass is admitted, the recovery is certain, and the rule of damages is the loss of the use, and the deterioration of the vessel.

In every view which has been taken of this case, I am, accordingly, of opinion, that the motion to dissolve the injunction ought to be granted.

#### Injunction dissolved.(a)

(a) See *Appleyard v. Seton*, (16 *Vesey*, 223,) where it is ruled, that an injunction to stay a trial at law must be founded on affidavit, stating the belief of the party, that the answer will furnish discovery material to his defence.

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v.

RHINELAN-  
DER.

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**BARROW AND OTHERS, assignees of PRIOR, a bankrupt,  
against RHINELANDER.**

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Where a merchant, in embarrassed circumstances, borrowed money, at different times, of his confidential clerk, who took various bonds and securities for such loans, and for which, by agreement, he was to be allowed a usurious interest; and, during the period of ten years, the parties, from time to time, came to a settlement of their accounts, and the merchant gave his bonds and further securities for the balance of principal and interest, due on such settlements; the court ordered all the bonds, obligations, and settlements, to be set aside, and the whole accounts, at large, to be opened between the parties, from the first commencement of their transactions, there being not only evidence of mistakes and omissions in the accounts, but of oppression, imposition, and undue advantage, taken of the necessities of the principal.

The master, in stating the account between the parties, was directed to allow *reets* therein, at such times as the parties liquidated their accounts, and agreed that the interest then due, should be considered as principal; and that the clerk should be charged with the amount of all the securities, assigned to him, which had been paid, or which he had refused to deliver to his principal for collection, or which had been lost by his negligence, default, or want of due diligence in collecting them, with interest, &c.

**EDMUND PRIOR**, a merchant in the city of New-York, became bankrupt, in *March*, 1802. The defendant, who was his confidential clerk, and kept his cash and papers, paid and received moneys, sold goods, made entries in the books, &c.; was retained in his service, as such clerk, from the 29th of *November*, 1790, to the 1st of *May*, 1796, and from the 4th of *July*, 1797, to the 4th of *July*, 1801. During the time the defendant was in the service of *Prior*, the affairs of the latter became greatly embarrassed; and the defendant lent him various sums of money, at different times. The bill stated, that, at the request of the defendant, no entries of these loans were made in the books; that, on the 29th of *May*, 1792, *Prior* executed to the defendant, a bond for 3,200 pounds; and, on the 15th of *June*, 1792, another bond for 1,966 pounds, which sums, however,

were not admitted ; that, before 1796, *Prior* paid the defendant 4,000 dollars ; and on the 30th of *April*, 1796, he and the defendant came to a settlement, when *Prior* being unable to pay, the defendant demanded 18 per cent. interest, to which *Prior* assented, and gave his bond to the defendant for 4,174 pounds, the balance then supposed to be due. *Prior*, also, gave a bond and mortgage to the defendant for 2,000 pounds, which was to be endorsed on the other bond, but which was not done ; that, on the 18th of *September*, 1796, *Prior* assigned to the defendant, as security, two bonds and twenty-eight notes, amounting to 8,154*l. 3s. 9d.*, exclusive of interest ; and, on the 8th of *June*, 1798, he assigned to the defendant, as security, five other bonds, and thirty-three other notes, the amount of which was unknown to the plaintiffs ; and, on the 4th of *February*, 1799, he further assigned to the defendant eight bonds and fifty-two notes, the amount of which was unknown ; the counterparts of the assignments were kept in an iron chest, to which the defendant and *Prior* only had access, and were lost, or taken away by means unknown ; that the defendant took other notes with blank endorsements, and nine watches, for which he refused to account ; that the defendant did not use due diligence to collect or secure the notes, &c. so assigned to him, whereby many of them were lost ; that to secure the usurious interest on the bond of 4,174 pounds, *Prior*, on the 30th of *April*, 1800, gave a bond to the defendant for 1,957 dollars, payable the 30th of *May* following ; and, on the 12th of *December*, 1800, he gave the defendant another bond for 4,500 dollars ; to secure which he executed a mortgage to the defendant for 4,805 acres of land in *Clin-ton* county ; and for which he, the next day, executed to the defendant an absolute deed, in which was expressed a consideration of 2,100 pounds, though there was no other consideration than the debt ; that *Prior* was in ill health, embarrassed, and greatly imposed on and oppressed by the defendant ; that on the 9th of *June*, 1800, he gave to the

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defendant a power to transfer 44 shares in the *Pennsylvania Population Company*, which were worth 3,500 or 4,000 dollars; that the transfer was absolute, though no consideration passed between the parties; that, in the spring of 1792, *Prior* found, on balancing his cash account, a deficiency of 1,052*l. 8s. 2d.*; and that the cash book, which was kept by the defendant, for the four years subsequent, showed great deficiencies; that, in 1801, the defendant said he wanted *Prior's* books to make out his account; that he then overlooked them for all the previous time of his clerkship, and made many alterations; that the defendant refused to account for the securities, the deficiency of cash, and the watches, or to allow for the shares and lots of land, or to give any account of the money really and truly due to him.

The bill waived all penalties and forfeitures, and prayed an account; that the defendant be charged with the value of the shares in the *Population Company*, and the unaccounted deficiencies, and for the notes, &c. lost by his neglect; that all property on which he has a lien might be sold; and that he deliver up and cancel the mortgage, assignments, &c. deed for the lands in *Clinton*, &c.

The defendant, in his answer, admitted that he was in the confidence of *Prior*, and had access to his papers, &c.; that he was the chief clerk, and usually made the entries in the cash book, and posted the books, though *Prior* sometimes did it, or employed another clerk for that purpose; that *Prior* directed his mercantile concerns, but was absent from home the greater part of the year 1791; that while defendant was in his employ, *Prior's* affairs were deranged, and, during the latter part of the time, greatly embarrassed, and his cash accounts much deranged; that the defendant communicated every error to *Prior*, who used to examine the books; that the cash and valuable papers were kept in an iron chest, of which the defendant kept one key, and *Prior* another; that *Prior* and his wife, and other clerks, had access to the chest. He admitted, that, taking a balance

of the cash account from the 12th of *May*, 1792, to the 30th of *May*, 1792, there appeared a deficit of cash of 1,059*l.* 8*s.* 2*d.*, which the defendant discovered and communicated to *Prior*; but he denied that the deficiency arose from his means, or that *Prior*, then, supposed so, but he believed it was caused by *Prior's* omitting an entry of the application, or remittance, of certain money received by him of *J. G.*; that there appeared, from the cash book, various other deficiencies, down to the 4th of *July*, 1801; that the overpayments, however, exceeded the deficiencies in number and amount. Between the 30th of *May*, 1792, and the 30th of *May*, 1796, the deficiencies were 3,452 dollars and 4 cents. The defendant alleged, that many of the entries were made by *Prior*, and his other clerks; and that the mistakes were imputable to them, and not to the defendant; and that none of the mistakes, &c., arose from fraud; and that *Prior* had acquitted him of all blame in regard to them; that he was possessed of considerable property in money and securities when he became clerk; that *Prior* soon applied to him to borrow money; that he frequently lent him money, and asked the legal interest. The first loan, of 17*l.* 10*s.*, was the 14th of *January*, 1796, 46 days after the commencement of his clerkship; that these loans were as regularly entered on the books as other transactions; that on the 25th of *May*, 1792, *Prior* gave the defendant a bond for 3,200*l.*; on the 15th of *June*, 1792, another bond for 1,986*l.*; and on the 23d of *October*, 1792, another bond for 200*l.*; that, on the 15th of *May*, 1793, they accounted together, and a balance of 5,962*l.* 19*s.* 11*d.*, was found due to the defendant; on the 15th of *May*, 1794, they accounted together, when *Prior* owed him 5,808*l.* 11*s.* 7*d.*, and gave another bond for that sum, on receiving which, the defendant cancelled the two bonds for 3,200*l.* and 1,986*l.*; that, on the 30th of *April*, 1796, they accounted together, and a final settlement was made, when *Prior* signed the account made out by the defendant, from the books, and

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gave it to the defendant ; that they settled, at the same time, as to the bond for 5,806*l.* 11*s.* 7*d.*, with the interest, which he denied to be usurious, or at the rate of 18 per cent. ; that *Prior* then agreed to give the defendant security, by bond and mortgage, and executed two bonds, one for 2,000*l.*, and the other for 4,174*l.* 12*s.* 11*d.*, being distinct parcels of the debt of 6,174*l.* 12*s.* 11*d.* on receiving which bonds, the defendant gave up the one for 5,806*l.* 11*s.* 7*d.* ; that, on the 18th of *September*, 1797, *Prior* assigned to the defendant, as security, two bonds and 28 notes, amounting to 8,514*l.* 3*s.* 5*d.* ; and, on the 18th of *June*, 1798, 38 bonds and bills, amounting to 10,738*l.* 16*s.*., were assigned to the defendant to secure the bond of 4,174*l.* 12*s.* 11*d.* ; that these bonds and notes were a confidential deposit, and *Prior* was to act as the owner of them ; that, on the 4th of *February*, 1799, *Prior* assigned to the defendant eight bonds and 52 notes, 35 of which had been included in the former assignments ; the nominal amount of the securities so assigned being 20,648*l.* 18*s.* 9*d.*, on the same confidential deposit ; that, on the 9th of *February*, 1801, the defendant gave notice of the assignments to the debtors ; and, on the 4th of *June*, 1801, he forbade any payments to *Prior*, and commenced collecting the debts, and used due diligence ; and he accounted for the non-collection of several of the debts. The defendant further stated, that, with the consent of *Prior*, he took from the iron chest several *Lock Navigation* shares, but had received no dividend on them ; that, on the 23d of *May*, 1799, *Prior*, as further security, assigned to him 44 shares in the *Pennsylvania Population Company*, which he held as security ; that he took three watches only, for which he charged himself at the selling prices ; that, on the 12th of *December*, 1800, he took *Prior's* bond for 4,500 dollars, but denied that it was for usurious interest ; that, when interest was payable, it was included in new bonds, and new bonds taken for the principal ; that the bond of the 30th of *April*, 1800, for 1,957

dollars, was for interest supposed to be due; that, on the 12th of December, 1800, *Prior* gave him the bond, and a mortgage on the *Clinton* lands, for 4,500 dollars, for interest supposed to be due, and for some payments on the shares in the *Population Company*. The defendant admitted, that he held these lands, as security, though the deeds were absolute. He denied that he had kept false accounts, or made alterations in the books of *Prior*.

*Prior* and his wife, and several other witnesses, were examined. The two former proved an express agreement between the parties, by which *Prior* was to allow, and did allow, the defendant usurious interest on the moneys loaned, viz. at the rate of one and a half per cent per month. Various mistakes, also, in the accounts, were proved, and various instances of an abuse of confidence by the defendant. The facts admitted by the answer will be sufficient to show the nature of the transactions between the parties, without entering into a detail of the evidence.

The cause was argued by *Riggs* and *Boyd*, for the plaintiffs, and *T. A. Emmet* and *Munro*, for the defendant. The argument was chiefly occupied in the examination of the answer, depositions, and schedules. To show that the settlements of the accounts ought to be opened, and that the plaintiffs were entitled to relief, the counsel cited *Bosanquet v. Dashwood*, *Cases temp. Talbot*, 37. 2 *Schoale & Lefroy*, 492. 3 *P. Wms.* 288. 2 *Atk.* 330. 1 *Atk.* 352. *Talbot's Cases*, 111. 5 *Vesey*, 48. 485. 7 *Vesey*, 599. 8 *Vesey*, 369. 11 *Vesey*, 358. 13 *Vesey*, 47. 2 *Atk.* 112. 119. 2 *Bro. C. C.* 47.

The counsel for the defendant, to repel the charge of usury, entered into a calculation, showing that the sums loaned, together with *compound interest* thereon, exceeded the amount of the securities taken.

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THE CHANCELLOR. This is a strong and peculiar case, which calls for relief. There appears to be very great reason to presume an abused confidence. The defendant was the confidential clerk of *Prior*, and kept his cash accounts, and had free access to all his papers and moneys. From the beginning almost of their connexion, *Prior* was embarrassed, and had recourse to the defendant for the loan of moneys. This created, at once, a delicate relation between the master and the servant; and the rapidity with which loans and debts were accumulated, securities exacted, the load of dependency increased, and blind and necessitous submission yielded, is distressing to learn, even as told in the defendant's answer. There are two witnesses to the charge of usury; and the attempt made, by the defendant, to get rid of the charge, under the explanation of taking compound interest, is not sufficient. The defendant does not put himself upon the benefit of the settlements made from time to time, but he, in fact, opens the accounts by his answer, and admits that the entries in the cash books were generally made by him, and that they contain the evidence of his loans. There is, also, proof of mistakes and deficiencies in the cash books, and of alterations. One mistake, for instance, of a charge, by the defendant, of 500*l.*, on the 15th of June, 1792, is not in the books. Other mistakes are alleged and shown; other instances of abused confidence are charged, as taking property from *Prior*, without his assent. In short, there are so many unpleasant and suspicious circumstances attending this case, leading so strongly to an inference of usury, oppression, and fraud, that it appears essential to the honour of the court, and the ends of justice, that all these multiplied settlements and obligations should be set aside, and that an account, at large, from the commencement of their dealings, should be taken and stated.

The cases cited by the counsel for the plaintiff, bear very pointedly upon the circumstances of this case, and show, that there is nothing unusual in granting the relief. Thus,

in *Bosanquet v. Dashwood*, (Cases temp. Talbot, 37.,) a bill was filed by the assignees of a bankrupt, charging the defendant's testator with lending on usury, and that agreements for that purpose were made and repeated from 1710 to 1724. It was a case of apparent extortion and oppression, and the accounts were ordered to be opened, and the demands reduced to moneys really lent, with lawful interest thereon. So, also, in *Vaughan v. Lloyd*, cited in 5 Vesey, 48., which was a case of principal and agent, and of abused influence and confidence by the agent. A variety of deeds and settled accounts were opened, though the accounts had been settled from time to time, and the defendant insisted on the benefit of those settlements. It appeared that several sums of money were charged improperly, and the accounts were impeached in several points, and the defendant was compelled to prove his accounts though he might suffer; for the Chancellor approved of the doctrine in *Piddock v. Brown*, (3 P. Wms. 288.,) that where there are manifest signs of fraud, the obligee ought to be put to the proof of actual payment, and if he suffered, it was owing to his own conduct. The same decision was made in *Watt v. Grove*, (2 Schools & Lefroy, 492.,) which was, also, the case of an agent availing himself of the negligence and extravagance of his principal. Indeed, the taking advantage of a man's necessities is as wrong as taking advantage of his weakness. This is not the case of merely showing mistakes and omissions in a stated account, in which the party is allowed to do no more than surcharge and falsify. Appearances wear a more serious aspect, and the whole account ought to be opened from the beginning, as was done in *Vernon v. Vandy*, (2 Atk. 119.,) after a period of 23 years. I do no more in this case, than has been repeatedly done in other cases which were not more oppressive in appearance.

I shall, accordingly, decree, in substance, as follows, viz.: "that the accounts between the parties be opened from the 29th of November, 1790; and that it be referred to a master

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to state an account ; and that, in doing it, the defendant be credited for all moneys loaned to *Prior*, or paid on his account, or received by *Prior*, belonging to him, between the 29th of November, 1790, and the 4th of July, 1801, with interest on the same, from the time the moneys were received, or paid, to the time of taking the account ; provided, that in stating such account, the master do make rests therein, at such times as it shall appear that the parties liquidated their accounts, and agreed that the interest then due should be considered as principal, and that the interest to be found due at the time of making such rests, and specially agreed to be paid in the particular case, be thereafter considered as principal. That, in taking the account, the master is not to admit, as evidence, any bond or obligation given by *Prior* to the defendant ; that the defendant is to be credited for wages for the time he served as clerk, at the rate of 500 dollars a year, with interest thereon, at the end of each year; that he is to be charged with all moneys received from *Prior*, or from his property, or debtors, before he became a bankrupt, or from his assignees since, and with all moneys paid on account of the defendant, with interest thereon, &c., and with all goods sold by *Prior* to the defendant, or taken by him, between the periods aforesaid, with interest thereon, from the time the same were payable by the custom of the store ; and with the principal sums due on all such securities taken by the defendant from *Prior*, without his permission, and of such securities as were assigned to him, and which he refused to deliver to *Prior* for collection, together with interest, &c. ; and that he be, also, charged with all moneys received on the securities assigned, with interest, &c. ; and with the principal and interest of such securities received from *Prior*, as have been lost by his negligence, default, or want of due diligence in collecting them. And it is further ordered, that the defendant be credited with the moneys paid for costs and charges of collection, or endeavouring to collect, the moneys due on such securities, and

which shall appear to have been reasonably expended, &c.; and, also, with the amount of such moneys as the defendant may have justly paid for taxes, and other necessary charges upon the *Population* shares, and the lands in the county of *Clinton*, with interest, &c.; and it is further ordered, that the defendant re-assign the *Inland Lock Navigation* shares, if he can, or that the master report the value thereof, &c.; and that he reconvey the lands in *Clinton* county, and the forty-four *Population* shares in *Pennsylvania*, if he can, or that the master report the value, &c.; and it is further ordered, that the master have power to compel the production of books and papers in possession of either party, and that he report, specially, any facts required by either party, and that the question of costs, and all further directions, be reserved.

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Decree accordingly.

At the hearing of the cause,\* *Emmet*, of counsel for the defendant, objected to the deposition of *Prior*, the bankrupt, on the ground of his interest, he not having released his right to the surplus of his estate.

*\*Sept. 28th.*

Where, at the hearing of a cause, and after the argument had been finished in part, an objection was made to the competency of a witness, whose deposition, taken before an examiner, had been read, the court allowed the plaintiff to prove the execution of a release of the witness of all his interest, by the examination of a witness, *who test. without any previous order or notice for that purpose.*

*Witness may be examined, *who test.* at the hearing, for a particular purpose, as to prove exhibits which had not been proved before the examiner. But the regular way is to*

*Boyd*, contra, insisted, that the objection came too late, the witness having been cross-examined by the defendant, before the examiner. He further offered to do away the objection, by proving, by a subscribing witness in court, the execution of a release by *Prior* to the assignees, dated the 29th of *March*, 1803, of all his *residuum* of interest. This offer was opposed, on the ground that there had been no previous notice of it.

THE CHANCELLOR directed the witness to be sworn. He observed that no objection was made to the competency of the witness until the argument was partly finished, and not until

*serve a previous order for that purpose, or notice, on the opposite party, four days before the hearing.*

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the counsel for the defendant had even made use of the deposition of the witness. And no reason is assigned why the party wishes for delay and time, by requiring four days notice of this mode of proving the release. This court has frequently admitted the examination of a witness, *viva voce*, at the hearing, for such a specific purpose as to prove an exhibit, which had been neglected to be proved before the examiner. (1 *Har. Chan.* 594, 595.) The regular way would have been to have had a previous order for the purpose, served on the opposite party, four days before the hearing, so that the party might not be taken by surprise. But under the circumstances of this case, some special cause, at least, ought to be shown why such an order, or notice, as a substitute for it, should now be required. In strictness, the party may be considered as having waived his objection to the competency of *Prior's* deposition.

Witness examined.

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October 27th.**GENET AND OTHERS against TALLMADGE AND OTHERS.****EMMET AND OTHERS against GENET AND OTHERS.**

The father of infant children, who has been appointed their *guardian* by this court, is entitled to receive their *distributive shares* coming to them from their grandfather's estate, on giving the requisite security; but where one of the *sureties*, before given by the guardian, had become insolvent, the court refused to order moneys belonging to the infants, and which had been paid into court by the administrator, to be paid over to the guardian, until other and further security had been given by him.

A *guardian* has no power or control over the *real estate* of his ward, further than concerns the *rents and profits*.

Where certain *commissioners*, appointed to make partition of the *real estate* of an intestate, pursuant to an act of the legislature, sold parts of the estate, and paid the proceeds into this court, pursuant to an order for that purpose, and which had been invested in public stocks, by the assistant register, the court refused, on the petition of the *guardian*, to order the money paid over, or the stocks transferred, to him.

IN the *first* of these causes, the petition of *E. C. Genet* stated, that, pursuant to an order in this cause, of the 21st of *October* instant, the defendant, *M. B. Tallmadge*, as administrator of *George Clinton*, deceased, had deposited in court 6,338 dollars and 37 cents, in cash, a promissory note, several certificates of stock, and a power of attorney, as mentioned in the order; that the money, &c. belong to the plaintiffs, as part of the *distributive share* coming to them from the estate of *George Clinton*, deceased; that the petitioner is *guardian* of the persons and estates of the plaintiffs, his children, and is desirous to recover the said moneys and stock, &c. as *guardian*, &c.; and he prayed accordingly, offering to give such further security as might be deemed fit and proper.

The *order* of the 21st of *October*, referred to in the petition, stated, that, on reading and filing the consent, signed by the solicitor and counsel of the plaintiffs and defendants, it

1815. security being given so as to cover those proceeds. I have had occasion,\* already, to observe, on the subject of this very estate, that the guardian was the proper person to be intrusted with these proceeds, on giving the requisite security. But it is a fact of public notoriety, for it has been declared by one of the former sureties himself, in the public prints, that there has been a failure of one of the sureties already taken, and who stood bound in the sum of 13,500 dollars for the guardian's fidelity. I must, therefore, require the deficiency of that security to be supplied, as well as the further security to be given, before I can permit any more moneys belonging to the infants to pass into the guardian's hands.

• *Sate, p. 3. S.C.*

But, in respect to the other petition, in which the guardian asks for the proceeds of the real estate of the infants, sold by the commissioners, the claim stands upon very different grounds. It is not the general policy of the law that any guardian should have it in his power, under any circumstances, to dissipate the real estate of his ward. The law never allows him any further control than over the rents and profits. The act of the 24th of *March*, 1815, authorizing the Chancellor to direct, in certain cases, a sale of the real estate of infants, has taken special care that the investment and disposition of those proceeds shall be under the direction of this court, so as to secure the same to the infant. The private act under which the commissioners sold, in the present case, has not made any specific provision touching the proceeds, except, generally, that they should be divided among the heirs according to their respective rights and interests therein. As far, then, as the interest of the minors is concerned, the disposition of the proceeds necessarily devolves upon this court; and the most prudent course is to follow the provision of the other act, and to make some order, under the control and discretion of this court, in respect to the disposition and investment of these proceeds. It is well understood, that the moneys, which are the object of this

petition, are not wanted for the immediate education and maintenance of the infants, and the investment of them in public stock, drawing a punctual and certain interest, and capable, at any time, of being converted into cash, appears to be as safe and judicious an investment as could at present be made. I see no good reason why these moneys should not remain subject to the investment already prescribed by the order of the court, and the petitioner has not suggested any other advantageous disposition of them.

I shall, accordingly, deny the prayer of this last petition, and make the following order in respect to the first :

“ ORDERED, that it be referred to one of the masters of this court, residing in the city of New-York, to inquire, ascertain and report the market value, in cash, of the *Manhattan Company* stock, and *Phoenix Insurance* stock, and of the nominal value or amount on the face of the *Turnpike* stock, mentioned or referred to in the above petition ; and that he further ascertain and report, on the application of the above petitioner, what person or persons would, in the judgment of the master, be competent security, and who are willing to be security, by a bond in the penalty of such sum as 15,000 dollars, and the stock so ascertained as aforesaid shall jointly amount to ; and with the usual condition for the faithful performance, by the petitioner, as guardian to his infant children, of his said trust, and to account when required. And that the said master further inquire, ascertain, and report, on the like application, on the competency of further security to be offered by the petitioner for the like purpose, in the penalty of 13,500 dollars, to supply and meet the deficiency of the former security, heretofore given by the petitioner to that amount, and which hath since proved to be insolvent ; and that he report with all convenient speed ; and all further directions are reserved until the coming in of that report.”

N. B. The security being offered, and its amount and

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competency ascertained by *Jeremiah I. Drake*, the master, it was ordered, on the 8th of November, 1815, that, on filing the bonds, &c., the proceeds of the distributive share of the personal estate, as in the petition first mentioned, be paid to *E. C. Genet*, the guardian.



Nov. 14th.

## MURRAY AND WINTER against BALLOU AND HUNT.

A *lis pendens*, duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree; and the pendency of the suit is deemed to commence from the service of the *subpoena*, after the bill is filed.

A purchaser of A., a trustee, is not chargeable with notice of the *trust*, by means of the *registry* of a deed from H. to B., reciting that A. had executed a declaration of the trust.

A person claiming as a *bona fide* purchaser, for a valuable consideration, must deny the fact of notice of a trust, and of every circumstance from which such notice might be inferred.

If a purchaser has notice of the trust at the time of purchase, he himself becomes a trustee, notwithstanding the consideration he has paid.

A purchaser of land buys at his peril, and is bound to look to the title and to the competency of the vendor.

A purchaser of land chargeable with constructive notice only, by means of a *lis pendens*, is not to be charged with *costs*, there being no actual fraud, though the purchase is set aside on the ground of the implied fraud.

Whether a *latent equity* in a third person, will defeat a *bona fide* assignee, without notice of his rights, except it be an assignment by an executor, which carries, on the face of it, notice of his *fiduciary* character? *Quære.*

THE bill, which was filed in October, (after the 10th,) 1814, stated, that the plaintiff, *Winter*, was trustee of *Heatley*, for certain lands, including a subdivision of lot No. 26., in *Cosby's Manor*, containing 50 acres. That *Winter* having failed in the due discharge of his trust, a bill was filed against

\* Vide *Green v. Winter, ante*, p. 26. 60. an injunction was issued, enjoining him from acting as trustee, &c. selling any of the trust estate, or the securities or

funds thereof; which injunction was duly served in *February*, 1809, and the injunction published in the *Utica Gazette*, in the county in which the lands are situated. That *Winter*, afterwards, by the order of this court, was superseded in his *trust*, and *Murray*, the other plaintiff, appointed *receiver*, and authorized to use the name of *Winter* in suits, &c. That *Winter*, in *August*, 1810, sold the premises, lot No. 26., to the defendant, *Ballou*, and took his bond and mortgage for the consideration money, which were afterwards assigned to the defendant *Hunt*, who, suspecting the authority of *Winter*, cancelled that bond and mortgage, and took a new bond and mortgage from *Ballou* to himself. The bill charged *Hunt* with notice that *Winter* had no authority to sell, without the previous approbation of *N. Pendleton*, *Robert Murray*, and *C. Sands*.

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The defendant, *Ballou*, in his answer, denied all knowledge of the suit in chancery, or of the injunction, except the publication of a notice of it in the *Utica Gazette*, in *March*, 1812. He stated, that he purchased the premises of *Winter*, in *August*, 1810, for 950 dollars, and received a deed the 31st of *October*, 1810, and gave a bond and mortgage. That, on the 24th of *November*, 1811, the defendant, *Hunt*, applied to him, and offered to advance him some money, provided he would secure the same, together with the bond and mortgage given to *Winter*, by a new bond and mortgage on land in *Utica*, which offer he accepted, and *Hunt* paid him 200 dollars; and he, thereupon, executed a bond and mortgage to *Hunt*, for 1,222 dollars and 4 cents, which had since been paid. That at the time of his purchase of *Winter*, and at the time of giving the bond and mortgage to *Hunt*, he had no knowledge of the injunction, or of any defect or suspension of power in *Winter* to sell; but he admitted that, before he paid the money to *Hunt*, he knew that the power of *Winter* was suspended; but he never received any notice not to pay the money to *Hunt*, and did not suspect that *Hunt* was not

1815. entitled to receive the money, which he paid to him *bona fide.*

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The defendant, *Hunt*, also denied all knowledge of the chancery suit, injunction, &c. until the notice published in the *Ulica Gazette*, in March, 1812. He admitted that, on the 3d of November, 1810, the bond and mortgage of *Ballou* were assigned to him, by *Winter*, with others, which he had agreed to accept in payment of certain shares in glass works, sold to *Winter*; that he had not, then, the least suspicion of any defect of right or title in *Winter* to the bond and mortgage; nor did he make any inquiry as to the title, or how *Winter* acquired them; that he paid *Winter* a full and valuable consideration for the bond and mortgage. That, on the 27th of November, 1811, he applied to *Ballou* for payment of an instalment on the bond; and as *Ballou* could not, conveniently, pay, and wanted money, he agreed to lend him a sum, and take a new bond for it, with the amount of the former bond, and a mortgage on land in *Ulica*. That the new bond and mortgage were paid off and discharged on the 1st of October, 1814. That, in the winter of 1812, he was called as a witness before the referees, in the cause of *Green v. Winter*, in this court, and was, afterwards, told that *Winter* was charged, by the *cestuy que trust*, with the securities taken for the land he had sold, and, among others, with the bond and mortgage given by *Ballou*.

The defendant, *Hunt*, admitted, that when he cancelled the bond and mortgage of *Ballou*, assigned to him by *Winter*, he had heard of a difficulty between *Green and his wife*, and *Winter*, relative to the *trust*; but the nature or extent of it he did not know, nor did he believe that it affected his case, or the acts of *Winter*, in regard to third persons.

The proofs and exhibits in the cause consisted, chiefly, of the pleadings and proceedings in the suit of *Winter v. Green*, for a summary of which, see *ante*, p. 26. 44. 60., and the final decree pronounced in that cause, the 5th of Octo-

ber, 1815. By that decree, it was ordered, that the defendant (*Winter*) should, within 40 days after service of a copy of the decree, execute a release, to be settled by the master, to *Mary* and *Henry Green*, in fee, of all the lands which have been conveyed to, or held by him in trust, except the lands which had been sold by him, and the proceeds charged to him in the master's report, of the 1st of April, 1815; and *M.* and *H. Green* to hold the same, in trust, according to the deed from *P. Heatley* to *Mrs. Green*, of the 8th of August, 1806, &c. And that the defendant, (*Winter*), at the same time, assign all bonds, mortgages, contracts, &c., in his power, relative to his trust; and that he be examined on oath, touching the same, before a master, if required; and that the defendant, within the same time, pay the balance of moneys due on the master's report to *M. and H. Green*, with interest thereon, from the date of the report, and the costs of suit, &c.

By the report of the master, of the 8th of February, 1813, it appeared, that *Winter* was allowed a deduction, or credit, among others, for a sum charged against him in the report of referees, of 1,000 dollars, being the proceeds of the sale of the lot of land to *Ballou*; and, after making all the deductions as directed by the order of reference, he reported the sum of 20,510 dollars and 1 cent, due from *Winter* to the plaintiffs, *W. and T. Green*.

*Gold*, for the plaintiff.

*N. Williams*, for the defendant, *Ballou*; and *J. Kirkland*, for the defendant, *Hunt*.

For the plaintiff, it was contended, 1. That *Hunt*, as assignee of *Winter*, as to the bond and mortgage, must stand in his place, and be subject to the same equity. (*Clute v. Robinson*, 2 Johns. Rep. 612. *Runyan v. Mercereau*, 11 Johns. Rep. 534. *Davies v. Austen*, 1 Vesey, jun., 249. VOL. I.

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*Matthews v. Wallroyn*, 4 Vesey, jun. 118. *Sugden's Law of Vend.* 482.)

2 That the pendency of the suit of Green and others, *cestuy que trusts*, against Winter, since the 30th of June, 1809, with the successive orders of injunction, may operate as notice, and protect the subject matter from all prejudice, from alienations by the trustee. (*Walker v. Smalwood*, 676. *Selfe v. Madox*, 1 Vern. 459. *Preston v. Tabbin*, id. 286. *Finch v. Newnham*, 2 Vern. 216. *Garth v. Ward*, 2 Atk. 174. *Worsley v. Scarborough*, 3 Atk. 392. *Sugden's Law of Vend.* 494.)

3. The registry of Scott's original deed to William Green, and of Green's mortgage to Heatley, in 1795, amounts to a constructive notice of the rights of the *cestuy que trusts*. The registry is notice to all the world; and the recital in the deed of Winter's trust, and the release of Heatley to Green, is notice of the instrument recited from the registry. (*Johnson v. Stagg*, 2 Johns. Rep. 510. *Jackson v. Neely*, 10 Johns. Rep. 374.)

4. The rights of the *cestuy que trusts* being protected by the *lis pendens*, the premises alienated to Ballou, by the trustee, still belong to them; or, if they should so elect, they may demand the proceeds of that sale.

For the defendants, it was contended, 1. That the defendants had no actual knowledge of the pendency of the suit at the time of the purchase; and if chargeable with notice at all, it must be an implied or constructive notice. It cannot be denied, that the general doctrine, as to *implied fraud*, though unknown to the common law, has been adopted in the courts of equity in *England*; yet, even there it has been received with reluctance, and with a manifest leaning against it, as an extremely hard rule. (*Sugden's L. of Vend.* 495. 2 Vesey, jun. 454. 3 Atk. 238.) The greatest man that has presided in the *English chancery*, (Lord Hardwicke,) says, "a *lis pendens* is only a general

notice of an equity to all the world, but cannot affect any particular person with a *fraud*, unless there was *special notice* of the title in dispute there, to that person." (3 *Atk.* 243.) Now, *Ballou* is charged with a *fraud*, in purchasing property which he *knew* did not belong to the vendor.

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Since the general rule of the *English* chancery, as to *litis pendens*, operates so injuriously to purchasers, it may well be doubted, whether, in this country, where landed property is in so different a situation, it ought to be adopted; unless perhaps, it has already become the established law of this court, of which there is no evidence. At any rate, the hardship of the *English* rule might be mitigated, even on principles to be found in the *English* books; that is, this *implied notice* to a purchaser should point, directly and unequivocally, to the object of the purchase, so as to bring into question the *very title* to that object, and not as to *collateral matters* relating to the object or estate, such as *accounts, misapplication of trust moneys, or abuse of complicated powers and trusts*. (See *Worsley v. Scarborough*, 3 *Atk.* 392.)

Again, it may be observed, in this case, that the *cestui que trust*, for whom so much is claimed, has been guilty of great negligence, *pendente lite*. After a discovery of the abuses of the trust, in 1809, a bill was filed; but the first step taken to remedy or redress the abuse was in 1812, when a *receiver* was appointed. And what measures were taken by the *receiver*? Did he attempt to ascertain the purchasers, and endeavour to rescue them, and the money, from an artful and fraudulent trustee, who had been an acknowledged and authorized agent of this extensive estate for so many years? If the defendants, upon a technical rule of the court, are to be charged with constructive fraud, or neglect, in not taking notice of the pendency of a complicated suit, the plaintiffs have been guilty of gross negligence in not detecting the abuses of their own agent, and averting their effects. Had

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they used due diligence, this money might have been saved to them.

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2. Although the rule be admitted, that a purchaser is bound to take notice of the contents of registered deeds, relating to his title, yet the *cestuy que trust* has been negligent in not having the declaration of trust recorded. At most, the defendants could only be chargeable with notice of the trust, and not of the abuses of power, or fraud, which took the plaintiffs, and the court, five years to discover and redress.

As to the defendant, *Hunt*, he stands before the court as a *bona fide* assignee, or purchaser, of the bond and mortgage, without notice of any defect in *Winter's* title or authority; nor is there any pretence that he knew of the conduct of *Winter*, in relation to the trust. He is, therefore, entitled to be protected, as far as the rules of law, or the principles of equity, will permit. (2 *Atk.* 8. *Ambler*, 764. 282. 2 *Vesey*, jun. 458. *Sugden's Law of Vend.* 545.)

But, in fact, the plaintiffs have no concern with *Hunt*, who may be considered as a mere conduit for the money which passed between *Ballou* and *Winter*, the vendor and vendee. When *Hunt* took an assignment of the bond and mortgage, and paid the amount to *Winter*, it was precisely the same as if *Ballou* had paid the money. This transaction did not affect the subject matter of the trust. If, as the plaintiffs contend, the sale to *Ballou*, by *Winter*, was in violation of this trust, then nothing passed to *Ballou*; and if the sale did not bind the *cestuy que trusts*, they could not compel *Ballou* to fulfil the contract. If an agent make a sale to a *bona fide* purchaser, which is not binding on the principal, it is not in the power of the principal to affirm or annul the bargain at his own pleasure. The contract must be reciprocal. If the plaintiffs demand the proceeds of the sale from *Hunt*, they affirm its validity. If they seek to annul the contract of sale made by *Ballou*, they can have no claims upon *Hunt*.

Again, it does not appear, from the pleadings or documents, that the plaintiffs could give a title for the land, if *Hunt* should be decreed to pay them the money.

*Hunt* denies all notice of the abuse of trust in *Winter*, or of the defect in his power. The change of security, afterwards, cannot vary his situation, or affect his rights, in regard to the plaintiffs. The doctrine of the *lis pendens* has no application to him.

The principle of law, that you may waive the *tort* and, go for the proceeds of the sale, cannot be extended to a person in the situation of *Hunt*. All the cases to be found are those in which actions are brought against the person who wrongfully converted the goods, or against a purchaser who had converted them, after notice, or a demand from the owner; not against a *bona fide* purchaser, into whose hands a chattel, which has been wrongfully converted, has passed, without any notice or demand by the right owner.

**THE CHANCELLOR.** The purchase, by *Ballou*, of *Winter* was made in *August*, 1810. The lot purchased was held, at the time, by *Winter*, in trust, for *Temperance Green*; and a suit was then, and for a year preceding, had been, pending in this court by Mrs. *Green* against *Winter*, charging him with a breach of trust, and praying that his authority, as trustee, might cease; and an injunction had been issued and served, enjoining him from any sale, disposition, or use of any of the lands or securities held by him in trust. The plaintiff, *Murray*, was, afterwards, appointed receiver, with authority to sue; and upon a reference and report, which took place in the progress of the suit, *Winter* was found in arrear to the amount of 20,510 dollars; and the amount of the above sale to *Ballou*, as being invalid and not binding on the *cestuy que trust*, was not allowed as a charge to *Winter*. By the final decree, *Winter* was ordered to convey and surrender to *Mary Green* and *Henry Green*, the

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persons for that purpose appointed by Mrs. Green, all the property and interest whatever held by him in trust.

The suit so commenced against *Winter*, having been in a course of continued and diligent prosecution, and having been finally conducted to a decree by which the charges in the bill were established, a question arises, and has been discussed in this case, whether the purchase by *Ballou*, of part of the trust property, *pendente lite*, is binding on the *cestuy que trust*?

*Ballou* has, in his answer, denied any knowledge of the suit at the time of his purchase. There is no proof to contradict the answer, and it is to be taken for true. But though he had no knowledge of the suit, it is not pretended that he was ignorant of the existence of the trust; and it is to be presumed, from his silence, that when he purchased from *Winter*, he knew that *Winter* held and sold the land, not in his own right, but as trustee. The bill charges, that it was generally known, at the time of the sale, that *Winter's* authority was questioned. The answer goes no further than to deny any knowledge of the chancery suit, or of the injunction, or of any suspension or defect of power in *Winter* to sell. The answer of *Hunt* is to the same limited extent; and the probability is, that it was a matter of public notoriety at the time, that *Winter* held the large real estate in his possession as a trustee.

It has been said by the counsel for the plaintiffs, that *Ballou* was chargeable with notice of the trust, by means of the registry of the deed from *Heatley* to Mrs. *Green*, which recited the declaration of trust executed by *Winter*. This deed, containing this recital, was registered on the 9th of April, 1810, but I cannot perceive any justice in obliging *Ballou* to take notice of the contents of that deed. By what clue was he to be directed to look into the deed from *Heatley* to Mrs. *Green*? He was dealing with *Winter*; and supposing *Winter's* trust to be, otherwise, totally unknown to him, he might as well be required to examine the contents of every

deed on record. If there had been any deed on record to which *Winter* was a party, he would have had a specific object and guide for inquiry; *cæsa regens filo vestigia*. I have, therefore, not thought it reasonable to charge *Ballou* with a knowledge of the existing trust, by reason of the registry of *Heatley's* deed, but rather to infer that knowledge from what is charged in the bill, and from the silence and the strong implied admission in the answer. The inference from the answer is decisive. If a party means to defend himself, on the ground that he was a *bona fide* purchaser for a valuable consideration, without notice of a trust, he must deny the fact of notice, and of every circumstance from which it can be inferred. (*Bodmin v. Vandembendy*, 1 *Vern.* 179. *Anon.* 2 *Vent.* 361. 3 *P. Wms.* 244. n. 2 *Vesey*, jun. 458. 9 *Vesey*, jun. 32.) And if notice of the trust existed when the purchase was made, then the general rule is, that the purchaser becomes himself the trustee, notwithstanding any consideration paid; (*Saunders v. Dehew*, 2 *Vern.* 271. 2 *F&b.* 152, 153.); and, though he may not, perhaps, be bound, in most cases, if the sale is fair, to look to the application of the moneys, yet, if the trust be suspended by process of the court, and the sale be made, as it was here, in contempt of that process, the purchaser, with notice, ought not to be allowed to defeat it. The question of notice of the trust is also material, inasmuch as the purchaser's knowledge of it goes to lessen or destroy the hardship, if any there should be, in the application of the maxim, *caveat emptor*. If every man purchases at his peril, and is bound to look to the title and the competency of the seller, the duty is the stronger, if he knowingly purchases of one acting as agent or trustee for others, for then he is bound to look into the validity and the continuance of the authority, and to call for an explanation of the nature and existing circumstances of the trust.

But it will not be necessary to rest the cause on this ground. The other point, which has been pressed for consideration,

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appears to be altogether conclusive. Admitting that *Ballou* had no knowledge, in fact, of the suit of *Mrs. Green* against *Winter*, when he made the purchase, he is, nevertheless, chargeable with legal or constructive notice, so as to render his purchase subject to the event of that suit. (The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the *subpæna* after the bill is filed.)

The counsel for the defendants have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me, for if it is a well-settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience; and, most probably, the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon ~~the~~ the service of a subpoena, might alienate his lands, and prevent the justice of the court. Its decrees might be wholly evaded. In this very case, the trustee had been charged with a gross breach of his trust, and had been enjoined by the process of the court, six months before the sale in question, from any further sales. If his subsequent sales are to be held valid, what temptation is held out to waste the trust property, and destroy all the hopes and interest of the *cestuy que trust*? A suit in chancery is, in such cases, necessarily tedious and expensive, and years may elapse, as in this case, before the suit can be brought to a final conclusion. If the property is to remain all this time subject to his disposition, in spite of the efforts of the court to prevent it, the rights of that helpless portion of the commu-

nity, whose property is most frequently held in trust, will be put in extreme jeopardy. To bring home to every purchaser the charge of actual notice of the suit, must, from the very nature of the case, be in a great degree impracticable. The only safe and efficient means of preventing such fraud and injustice, is to charge the purchaser with dealing with the trustee at his peril. The policy of the law does, in general, cast that peril upon the purchaser. *Caveat emptor*, is the settled maxim of the common law. It is his business to inquire and to look to the person with whom he deals. If he knows him to be a trustee, then let him inquire of the *cestuy que trust*, or let him ask at the register's office, whether there be any suit pending against such trustee. He can always be safe if he uses due diligence; but the other party has no means of safety beyond his application to the court. Whatever may be thought of the rule, it appears to me to be less severe than that acknowledged rule of the common law, on which our courts have repeatedly acted, that a conveyance of land, without any warranty or covenant of title, will not enable the purchaser to resort back to the seller, even if the title should fail; (*Frost v. Raymond*, 2 *Caines' Rep.* 188.); and if he has covenants to secure his title, he can seek for no more than the consideration which he has paid, without any allowance for the rise in value of the land, or the value of the improvements. (*Pitcher v. Livingston*, 4 *Johns. Rep.* 1.)

I have said that the *lis pendens* was, of itself, notice to the purchaser, and it will now be proper to show that this rule is well established in our law. It is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. It was one of the ordinances of Lord Bacon, laid down for the better and more regular administration of justice in the court of chancery, that, "no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant, be-

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fore the bill exhibited, and is made no party, neither by bill nor order: but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth." (Lord Bacon's works, vol. 4. 511.) Here we find the rule declared above two centuries ago, and by the highest authority to which we can appeal; and it will appear to have received support and application down to this day. In the case of *Martin v. Stikes*, (cited by Lord Nottingham, in his *Prolegomena of Equity*, and, again, in 11 *Ves. 200.*) the bill was filed in 1640, and was abated, by death, in 1648; and a bill of revivor was filed in 1662, and the purchase was made in 1651, and yet, as the purchase was, by relation of the bill of revivor; made *pendente lite*, the purchaser was held bound, and by no less a character than Lord Clarendon. I cite this case, not with approbation, but merely to show the great extent to which the rule has been anciently carried. When this very case was, afterwards, in a new shape, brought before Lord Keeper Bridgman, (1 *Cas. in Ch.* 150.,) he observed, that it was not *form*, but the substance of a decree, that all are bound by it who come in, *pendente lite*. The case of *Culpepper v. Austin*, which was a few years subsequent, (2 *Ch. Cas.* 115. 221.,) is a strong determination on the same point: in that case the testator had conveyed his lands to his executors, in fee, to pay his debts; and after his death the defendant purchased the lands of the executors for a valuable consideration. The heir brought his bill, to have the land, on the ground that the lands were not wanted to pay debts; and the Lord Chancellor held, that the suit pending between the heir and the trustee, to have an account, was sufficient notice, in law, without actual notice of the suit, and the party purchased at his peril; so that if, in the event of the suit, it appeared that the sale was unnecessary and improper, the heir would recover against the purchaser. It turned out, afterwards, that the defendant lost his purchase, though he

had no actual notice of the suit, and though he had purchased and paid the same day the bill was exhibited. (*Vide*, as to this result, what was said by the Chancellor in *Baens v. Canning*, 1 Ch. Cas. 301.) The case of *Fleming v. Page* and *Blaker* arose during the time of Lord *Nottingham*, (*Rep. temp. Finch*, 321.) These were purchases made by the defendants for a valuable consideration, but they were made *pendente lite*, and for that reason the purchasers were decreed to reconvey and deliver up the writings. The same general principle, that all persons who come in as purchasers, *pendente lite*, though they are no parties to the suit, they and their interests shall be bound and avoided by the decree, is laid down as the known law, in several cases to be found in *Vernon*, and to which it will be sufficient only to refer. (*Preston v. Tubbis*, 1 Vern. 286. *Anon. 1 Vern. 318. Goldson v. Gardner*, cited in *Self v. Madox*, 1 Vern. 459. *Finch v. Newnham*, 2 Vern. 216.)

If we come down to more modern times, when the principles of equity may be supposed to have been more highly cultivated, and more precisely defined, we shall find the rule recognised with equal force. Thus, in *Sorrel v. Carpenter*, (2 P. Wms. 482,) the defendant purchased an estate, *pendente lite*, from one *Ligo*, after subpoena served on *Ligo*, and before answer, for the full value, and without any notice of the plaintiff's title, or actual notice of the suit. This was the strongest case that could be imagined, and under circumstances far more favourable to the purchaser than the present; and Lord Ch. *King* said, that it was a very hard case to set such a purchase aside, yet he admitted that such was the rule, and that it was taken from analogy to alienations pending a real action at law. This doctrine came frequently under the review of Lord *Hardwicke*, and he always held that a purchaser, *pendente lite*, was bound by the decree in the suit. The pendency of the suit was, of itself, notice; and he observed, that the rule was to prevent a greater mischief that would arise by people's purchasing a right under

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litigation. (*Garth v. Ward*, 2 *Atk.* 174. *Worsley v. Scarborough*, 3 *Atk.* 392.) Lord Camden, afterwards, enforced the same rule. "I hold it," he said, "as a general rule, that an alienation pending a suit is void." (*Walker v. Smalwood*, *Amb.* 676.) I shall conclude this view of the English authorities with noticing the observations of the Master of the Rolls in the case of *The Bishop of Winchester v. Paine*, (11 *Ves.* 194.) "He who purchases during the pendency of the suit, is bound," says Sir William Grant, "by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed. Otherwise, suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it."

It would be impossible, as I apprehend, to mention any rule of law which has been established upon higher authority, or with a more uniform sanction; and I should have thought it necessary to apologize for wasting so much time on the point, if I had not found the rule, ancient and stable as it is, questioned and resisted by plausible considerations addressed to the feelings. I may, also, be permitted to add, that as I am without the aid of any public reports, or any distinct knowledge of the decisions of this court during the time of my predecessors, I am obliged, in almost every case, to re-assert, expound, and vindicate the principles of our equity jurisprudence. Many a point is now raised which would, probably, never have been disturbed, if the means had been afforded to learn the doctrines of the court; and it cannot be too often repeated, and too deeply impressed, that established principles in equity can no more be dispensed with than the rules of law, and for this plain reason, that I am not clothed with a dispensing power.

The persons in whose behalf this suit was instituted are, consequently, entitled to a conveyance of the land sold to *Ballou*, equally as if the title had remained in *Winter*. The suit is, also, against *Hunt*, the assignee of the bond and mortgage given by *Ballou*; and the counsel for the plaintiffs seek either the land or the proceeds of the sale, and appear to be equally willing to accept of either. *Hunt* purchased the bond and mortgage, as he says, without knowing or inquiring as to the consideration for which they were given; and though he took them subject to all the equitable claims of *Ballou*, yet, as between him and the *plaintiffs*, the question may not be the same; and I think it will be unnecessary for me to decide, at present, whether the doctrine of this case reaches him, so as to protect from assignment all the bonds and other securities taken by *Winter* in his character of trustee.

This point underwent much discussion in the house of lords, in *Redfearn v. Ferrier and others*; (1 *Dow's Rep.* 50.) and it was there held, on appeal in a *Scotch* case, that a latent equity, in a third person, shall not defeat a *bona fide* assignee of a right without notice, except it be an assignment by an executor, which carried on the face of it notice of his fiduciary character. (See p. 54. 59, 60. 66. 72.)

The claim raised by the bill against *Ballou*, for the land, and against *Hunt*, for the proceeds of the sale, are inconsistent with each other; for the one annuls, and the other affirms, the sale. The claim to the land is clear of all difficulty, and comes within all the cases; and the only use I shall make of the demand in the alternative, for the lands or the proceeds, will be to relieve *Ballou* as far as it is possible from the loss of his improvements, by giving him the alternative, to convey the land, or keep the land, and pay the amount of the consideration he gave, together with the interest thereon.

I shall, accordingly, decree, that the defendant, *Ballou*, within 40 days from the service of a copy of the decree,

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convey, in fee, the lot in question to *Mary Green* and *Henry Green*, to be held by them, in trust, &c. unless he shall, within that time, elect to pay, and actually pay, or tender, to the said trustees, the amount of the bond he gave to *Winter*, with interest thereon, to the date of this decree.

As *Ballou* is not charged with actual, and only with constructive, notice of the suit, here is no real fraud in the case; and though the purchase cannot be permitted to stand, there is equity in not carrying the doctrine of constructive notice in this case so far as to charge him with costs. I shall, therefore, not award costs to either party, as against the other; and the bill, as to the defendant, *Hunt*, must be dismissed. But as there was probable ground for bringing him into court, and as he has no more real equity to protect him than the other defendant, I shall dismiss the bill, as to him, without costs.

Decree accordingly.

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Nov. 14th.

J. & H. BOYD against MCLEAN AND WIFE.

If A. purchases land with his own money, but the deed is taken in the name of B., a *trust* results, by operation of law, to A.; and the fact, whether the purchase was made with the money of A., on which the resulting *trust* is to arise, may be proved by *parol*, it not being within the statute of frauds. And this parol evidence is admissible, not only against the face of the deed itself, but in opposition to the *answer* of the trustee, denying the *trust*; and that, it seems, after the death of the nominal purchaser. Such evidence, however, is to be received with great caution.

THE bill, which was filed in *January*, 1812, stated, that the plaintiffs, in *March*, 1803, entered into articles of agreement, in writing, with *Thomas Colden*, whereby he agreed to sell to the plaintiffs, in fee, and they agreed to purchase, a lot of land in *Newburgh*, containing 10 acres, for which

the plaintiffs agreed to pay 1,000 dollars, in 4 years, with interest from the 1st of *May*, 1803; and *Colden* agreed that the plaintiffs might take possession, and that he would execute a conveyance, on payment of the money as mentioned. That, in *June*, 1807, the plaintiffs applied to the defendant for a loan of 1,500 dollars, for securing the repayment of which they were to give a bond and mortgage; to avoid, however, the operation of two judgments against the plaintiffs, which would have a priority to the mortgage, if the conveyance of the lot was made to the plaintiffs, it was agreed that *Colden* should execute the deed to the defendant as security for the loan, and that the defendant should reconvey the premises to the plaintiffs, on the repayment of the 1,500 dollars, in four years, with interest. In pursuance of this agreement, the defendant lent the plaintiffs the 1,500 dollars, and *Colden* being paid the 1,000 dollars, conveyed the land, at the request of the plaintiffs, to the defendant. That, afterwards, the defendant lent the plaintiffs some other small sums of moneys, amounting in the whole to 305 dollars and 50 cents, for which the plaintiffs gave their bond; that, on the 22d of *June*, 1811, and before the expiration of the 4 years from the time of the first loan, the plaintiffs called at the house of the defendant, to pay him the whole amount due to him; and in his absence, offered to pay his wife 2,500 dollars, in specie, being the amount of all the loans, with interest, which she refused; and, in *August*, 1811, the defendant brought an action against the plaintiffs on the bond, and refuses to reconvey the land to the plaintiffs, &c. The plaintiffs prayed that the defendant might come to an account; and that, on the plaintiffs paying the amount due to the defendant, he might be decreed to reconvey the premises, &c.

The defendant, in his answer, admitted the agreement between the plaintiffs and *Colden*, in 1803, and that the plaintiffs took possession under it. But he alleged that the plaintiffs did not perform their part of the agreement, nor pay the 1,000 dollars to *Colden*, though demanded by him; and

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that the agreement was dissolved, and it was so understood by all parties. That *Colden* offered to sell the premises for 1,500 dollars, in cash; that the plaintiffs, in June, 1807, applied to the defendant for the loan of 1,500 dollars, in order to make the purchase, and the defendant refused to lend the money; that the plaintiffs then advised the defendant to make the purchase, which he did accordingly, and paid *Colden* the 1,500 dollars, and took the deed. That the business of the purchase and payment was transacted by *William Ross*, as the agent of the defendant. The defendant denied any agreement for a loan of 1,500 dollars, or that the plaintiffs should mortgage the land to secure it; that he knew nothing of any judgments as stated in the bill of the plaintiffs, and denied that the deed was taken by him, as a substitute for a mortgage, or that any loan was agreed to; and averred that the conveyance to him, by *Colden*, was made absolutely, and without any agreement to reconvey, &c. He admitted that, being urged by the plaintiffs, and assured by them of their ability to pay soon, he did, about the time of his purchase from *Colden*, tell the plaintiffs, that if the 1,500 dollars was paid to him, within two years from the time of the purchase, with interest, he would sell and convey to them the land; that this was a mere parol promise; that 1,500 dollars was, at that time, the value of the land; that the plaintiffs were permitted to remain in possession, without any special agreement, and did not pay, or offer to pay, the 1,500 dollars, &c.; and the defendant insisted on the benefit of the statute of frauds, which avoided the parol agreement, &c.

He admitted that the plaintiffs, in his absence, offered to pay to his wife 2,500 dollars, which was refused; but alleged that no money was shown or counted; that he afterwards sued the plaintiffs on the bond, &c.

Twelve witnesses were examined on the part of the plaintiffs, and four on the part of the defendant; but it is unnecessary to detail the evidence contained in their depositions, as

the material parts are stated, and the whole weighed by the court in pronouncing the decree.

The cause was argued by *T. A. Emmet*, for the plaintiffs, and *S. Jones, jun.* for the defendant.

The counsel for the defendant objected to the competency of the parol evidence, to prove a parol contract, or a resulting trust; and it was read, subject to all exceptions.

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*For the Plaintiffs*, it was insisted, 1. That the 1,500 dollars, paid to *Colden*, in June, 1807, was borrowed of the defendant, and received by *Colden* as the money of the plaintiffs; and that the purchase being made with their money, a *resulting trust* was created for their benefit.

2. That the defendant took the deed, as a mortgage merely, or by way of security for the loan, and that the plaintiffs, therefore, had a redeemable interest, which was not barred by the non-payment at a particular day. (*1 Fonbl. Equ. b. 1. ch. 6. s. 2. p. 392. n. (e.) Newland on Contracts, 130—138.*)

3. That if the defendant did not intend to take the deed as a trust, he obtained it in *fraud*. (*Roberts on Frauds, 102. 1 Cruise Dig. 485. s. 61.*)

*For the Defendant*, it was insisted, that the defendant, in his answer, having absolutely denied any loan, or trust, the parol evidence was inadmissible. To admit parol proof of confessions of a defendant, in contradiction to his answer, to recover real property, must be of the most dangerous tendency. (*Sugden's Law of Vendors, 415—418.*) That the answer of the defendant was supported by the evidence of *Ross*, his agent. That, according to the plaintiffs' statement of the *parol* contract, it was unilateral, on one side only; there was no reciprocity.

That to constitute a mortgage, there must be a *defeasance* in writing, there being no other way to defeat an absolute conveyance in writing, unless there be fraud; (*Prec. in Ch:*

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426. *Str. 236. Talbot's Cases, 61.*; but the plaintiffs, by their bill, having put their case solely on the ground of a resulting trust, ought not to be listened to, on the suggestion of fraud. The charge of fraud is fully repelled by the evidence of Ross.

*#1000(?)*

**THE CHANCELLOR:** The ground on which the claim of the plaintiffs rests is, that the 1,500 dollars which were paid to *Thomas Colden*, in 1807, as the consideration for the purchase of the premises, were the moneys of the plaintiffs, procured from the defendant as a loan, and that the defendant took the deed in his own name, by agreement, and became thereby a trustee for the plaintiffs; and that such a resulting trust, being a trust arising "by implication, or construction of law," is expressly excepted from the operation of the statute of frauds, (*Laws of N. Y. sess. 10. ch. 44. sect. 13.*) and may be proved by parol.

Two questions arise upon this case, 1. Whether the law be as has been suggested; and, 2. If the parol proof be admissible, whether it be sufficient to establish the fact.

There is no doubt, that if A. purchases an estate with his own money, and the deed be taken in the name of B., a trust results, by presumption of law, to A., who advances the money. This is a well-known and a universally admitted rule in equity. The point raised is, whether such a resulting trust be within the statute of frauds, and whether the fact, on which the trust arises, may be shown by parol proof, in opposition to the language of the deed, and even in opposition to the defendant's answer.

There are several writers who have discussed this point.

\* *Sugd. Law Sugden\** says, that the parol proof is clearly admissible; of *Vend. 414.* but that it seems doubtful whether it be admissible against *419.*

+ *2 Aik. 150.* note (2.) *San-* of opinion, that if the consideration money is expressed in *ders on Uses* and *Trusts*, the deed to be paid by the grantee, parol proof cannot be *127—134.* admitted, after the death of the nominal purchaser, to prove

the resulting trust; but *Sugden* says, there is no reason or authority for that distinction, and that it may be received after, as well as before, his death. *Roberts\** goes further, and denies that a confession of the trust, by the nominal purchaser, can be proved at all by the parol evidence of a third person. If I were to be governed by the weight of these different opinions, I should place reliance upon the judgment of *Sugden*, as being the most accurate and perspicuous writer. But, on a question of importance, and leading to so much discussion, I have felt it to be a duty to look into all the cases; and the conclusion in my mind is, that I am bound by authority to receive the proof. If the point were *res integra*, I should be inclined to agree with Sir Thomas Clarke, in *Lane v. Dighton*,† that such evidence is too dangerous in its consequences; but this objection comes too late, as the rule appears to be well established, and as he observed when he was obliged to bow to the authorities, “I must not be wiser than my predecessors.”

In *Gascoigne v. Therving*, (1 *Vern.* 366,) which was as early as in 1685, before Sir John Trevor, the Master of the Rolls, the very point before us arose in its full extent, and the fact of the purchase with the money of the plaintiff was charged in the bill and denied in the answer, and the statute of frauds was, also, relied on as a defence. After a long debate, the plaintiff was admitted to read his proofs, and as the evidence consisted only of what had passed in discourses, and been owned by the defendant, and was doubtful, and left some secret in the cause not understood, the bill was dismissed, though without costs. This case settled the principle, and only left a salutary admonition as to the caution with which such proof ought to be examined. The case of *Kirk v. Webb* (*Prec. in Chan.* 84.) was some years later, and looks rather unsavourable to the admission of the parol proof. It appeared, before a master, that part of the purchase money laid out by a trustee, in lands, belonged to the trust estate, and the question was, whether,

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\* *On Stat. of Frauds, 99.*

† *Amb. 405.*

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upon that proof, the lands so purchased might not be followed by the *cestuy que trust*. The decision was against the bill; but the opinion of the court (consisting of the Chancellor, assisted by the Master of the Rolls and one of the judges) is not reported with any precision or clearness. Mr. J. Powell said, it was a case without precedent; and the Master of the Rolls, who was also against the plaintiff, observed, that if it had been plainly proved, that the purchase had been made with the profits of the trust estate, he should have decided otherwise. The particular reasons of the Chancellor, and who was no less a character than Lord Somers, are passed over in silence. The case is, therefore, imperfectly reported; and if it were intended to be decided, that trust money laid out in land could not be followed by parol proof, the case has been decidedly overruled, for such an inquiry has been frequently directed, as was done in *Lane v. Dighton*, (*Amb. 409.*) and in several cases which are there cited by the Master of the Rolls. The next case which I shall mention, in favour of the parol proof of a resulting trust, is one that arose in 1729, before Lord Ch. King, (*ex parte Vernon*, 2 P. Wms. 548.) He admitted parol proof of acknowledgments by the nominal grantee, that the purchase money was paid by another, and that the grantee was only a trustee, though he had taken the receipt of payment, and he directed the infant heir of the grantee to convey to the *cestuy que trust*. Lord Hardwicke repeatedly, as in the cases of *Ryall v. Ryall*, (1 Atk. 59. *Amb. 413. S. C.*) *Willis v. Willis*, (2 Atk. 71,) and *Lloyd v. Spillet*, (2 Atk. 148,) recognised the doctrine, that where a purchase was made in the name of A., and the money paid by B., it was the case of a resulting trust which was excepted out of the statute of frauds; and that this fact, from which the trust was to arise, could be established by parol proof. We meet with the same decision, afterwards, by Sir Thomas Clarke, in *Peachy's case*, (cited in *Sugden's Law of Vendors*, 3d Lond. edit. p. 462,) as well

as in the case of *Lane v. Dighton*, to which I have already alluded. But in *Bartlett v. Pickersgill*, (cited in note to 4 East. 577.,) Lord Northington makes no distinction, whether the trust was, or was not, denied in the answer; and this case, and the one in *Vernon*, would seem to be sufficient to remove any doubt as to the competency of the proof in opposition to the answer. In that case, the defendant bought an estate for the plaintiff, and took the deed in his own name, and refused to convey, and in his answer denied any trust. There was no written agreement in the case, nor was any part of the purchase money paid by the plaintiff; and, on that ground, parol proof that the estate was purchased for the plaintiff, was rejected. The Lord Ch., however, observed, "that is was not like the case of money paid by one man, and a conveyance taken in the name of another. If the plaintiff paid any money, or if any fraud was used by the defendant, to prevent an execution of the agreement, it would have been a reason with him to admit the evidence."

This last case further shows, that the question of loan or no loan is a proper object of inquiry in respect to this trust; for it was observed, that if the bill charges that the estate was bought with the plaintiff's money, and the defendant should say he borrowed it of the plaintiff, then the proof would be whether the money was lent or not.

In the late case of *Lench v. Lench*, (10 Ves. 517.,) the Master of the Rolls, Sir Wm. Grant, admitted parol proof of the naked declarations of the purchaser that the purchase was made with trust money belonging to the plaintiff; and he observed, that whatever doubts might have been formerly entertained upon the subject, it was now settled, that money might, in this manner, be followed into the land in which it was invested, and a claim of this sort supported by parol evidence. In a still later case, (*Finch v. Finch*, 15 Ves. 50.,) Lord Eldon speaks of the rule admitting a resulting trust out of the statute of frauds, as a clear rule, and long established.

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To this train of chancery decisions we ought to add, as a circumstance of decisive weight, that the supreme courts of this state, and of Pennsylvania, have received and treated the rule in equity which these cases support, as being settled beyond all doubt or contradiction. (*Jackson v. Sternbergh*, 1 Johns. Cases, 153. *Foote v. Colvin*, 3 Johns. Rep. 216. *Lessee of German v. Gabbald*, 3 Binney's Rep. 302.)

I consider myself, therefore, bound by this series of authorities, and that the parol proof taken in the present case is to be received as competent.

I think there can be no question but that the suit, if it can be otherwise sustained, is brought within sufficient time. The bill was filed within four years and a half from the purchase of the defendant, and the plaintiffs have continued in possession. It has no analogy to the case of *Delane v. Delane*, (4 Bro. P. C. 258.,) where, though the resulting trust was established by parol proof, yet the demand was rejected as stale, there having been an acquiescence of 17 years under a denial of the trust, and possession against it.

2. The next point in the case is on the question of fact, as to the sufficiency of the proof to establish the trust.

The cases uniformly show, that the courts have been deeply impressed with the danger of this kind of proof, attending to perjury and the insecurity of paper title; and they have required the payment by the *cestuy que trust* to be clearly proved. In the case of *Leuch v. Lenck*, Sir Wm. Grant did not deem the unassisted oath of a single witness to the mere naked declaration of the trustee admitting the trust, as sufficient, and there were no corroborating circumstances in the case. He thought the evidence too uncertain and dangerous to be depended upon. It would be easy to multiply instances of the like caution and discretion; and the only inquiry is, whether here is not convincing and satisfactory proof of the *loan* to the plaintiffs, and, consequently, the payment of the consideration in the deed *with their moneys*.

The fact of the loan to the plaintiffs, of the 1,500 dollars, to enable them to purchase the lot, and the defendant taking the deed in his own name, merely as a safer security for his reimbursement, is explicitly proved by the testimony of *Patrick Burnett*, *Thomas Colden*, and *Benjamin T. Case*, who all declare that they were present when the parties, being together, made or acknowledged such an agreement. The testimony of *Colden*, who executed the deed, is equally particular and impressive. He says he went with the plaintiffs to *William Ross*, the acknowledged agent of the defendant, and that *Ross*, as such agent, agreed with the plaintiffs, in his presence, that the defendant would lend the 1,500 dollars; and that the deed should be executed to the defendant, to avoid some debts or judgments against the plaintiffs which might have preference to a mortgage; and that the defendant only wished the money secured, and that it might rest for two, three, or four years; and he says he executed the deed upon this understanding of the parties, and gave it to *Ross*, who, on the behalf of the plaintiffs, paid him the money.

Burnett does not specify the time or place, but says he was present when one of the plaintiffs applied to the defendant for the loan of the 1,500 dollars, and the defendant agreed to lend, and take the deed in his own name, as a security, in consequence of some bonds or judgments against the plaintiffs. *Case* says, that he was clerk to *Ross*, and was present in his office about the time of the purchase, and when the defendant left 600 dollars, part of the 1,500 dollars, and one of the plaintiffs was present; and he understood from the parties, at that time, that the loan and purchase were made as is stated by the other witnesses; and that it was to receive its present modification for the same reason. These three witnesses refer back to the time of making the contract; and though the general character of *Case* is somewhat impeached by the testimony of *William Taylor*, yet that testimony is not strong, as *Taylor* had but an imperfect know-

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ledge of the character of *Case*; and *Ross* says that *Case*, at the time of making the contract, was a clerk in his office.

In addition to the testimony of these witnesses, as to the original transaction, the confessions of the defendant, to the same facts are proved by a number of other witnesses.

Peter Baunin testifies to a confession of the defendant, in 1812, of the fact of the loan, and of the taking the deed in his own name, the better to secure the money. *Jonathan Jordan* proves an acknowledgment of the defendant, in 1810, to the same thing, in substance. Other witnesses prove confessions of the defendant, altogether inconsistent with the allegation that his purchase was an absolute one, and that he never entered into any contract with the plaintiffs by which they were allowed to redeem the land. *Peter Hedges* heard him say, in 1809, that he wished to take no advantage of the plaintiffs, and *wished to save to them the lot*; and *Edward Griswold* heard him say, in 1812, that the plaintiffs, either then or previously, (and the witness does not distinctly recollect which,) had a redeemable interest; and that *he entered into the business only to oblige them*.

In opposition to this mass of evidence, there is the answer of the defendant, expressly denying the loan, and any contract with the plaintiffs on the subject, and insisting that the purchase was absolute and unconditional: and there is, also, the testimony of Mr. *Ross*, the agent and son-in-law of the defendant, denying, so far as he acted as agent, the loan and the purchase in trust, and asserting that the deed was executed and received by him as an absolute deed to the defendant, in pursuance of instructions received by him for that purpose.

The defendant, in his answer, does, indeed, admit a parol observation of his to the plaintiffs about the time of the purchase, but which made no part of the purchase, nor was intended to be of any binding force; that if the plaintiffs would pay him the 1,500 dollars, with interest, within two years, he would convey the land to them. This averment receives,

also, some support from the evidence of *Taylor*, who testifies to a confession of one of the plaintiffs, made in 1810, that *when the defendant purchased the lot, he gave them time to redeem, and which time had passed.*

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The weight of the above testimony, duly compared, appears to me to be decidedly in favour of the charges contained in the bill; and there are several corroborating circumstances which are of considerable moment. It is admitted that the plaintiffs entered into a contract with *Colden*, for the purchase of the lot, and took possession under that contract; that they failed to make the payment in 1807, and were, nevertheless, very solicitous to complete the purchase, and applied to the defendant for a loan of money. So far, the facts are agreed on; and they show a very sufficient inducement to the alleged contract. But the defendant denies the existence of the loan, or even any agreement for time to redeem. Why, then, or for what purpose, were the plaintiffs, or one of them, present at the execution of the deed and the payment of the money? If they had no concern in the purchase, their presence is unaccountable. The plaintiffs were not only present at the purchase, but they were suffered to continue in possession for five years after the purchase, or down to the commencement of this suit, without any agreement for rent, or any demand for use and occupation. These facts are natural, and consistent with the charge in the bill, but utterly inconsistent with the allegations in the answer.

I shall, accordingly, decree, that it be referred to a master, to ascertain and report the sum due to the defendant on the loan of 1,500 dollars, with interest, computed from the 24th of June, 1807; and on the bond for the payment of 305 dollars and 50 cents, and bearing date the 25th of October, 1808; and that the plaintiffs, within 30 days from the confirmation of the master's report, pay, or tender, the amount thereof to the defendant, *John McLean*, together with the

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costs of the suit at law upon the bond. And that the defendant, thereupon, duly execute and deliver a deed, in fee, to the plaintiff, of the lot of land described in the deed from *Colden* to the said *John McLean*, as mentioned in the pleadings, with proper and apt words of covenant by the said *John* against his own acts; and that he further pay the costs of this suit, except that part which accrued by the issuing of the injunction.

Decree accordingly.

Nov. 14th. MARKS AND OTHERS against PELL, *devisee and executor of PELL.*

No length of time is a bar to a redemption of a mortgage, where there is fraud in the transaction, or where, by the agreement of the parties, at the time, the mortgagor is to enter and keep possession until he is paid out of the profits.

Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that the defeasance has been destroyed by fraud or mistake.

But where a bill was filed for an account and for a reconveyance, 30 years after the deed, alleged to be a mortgage, was given, during all which time the defendant had been in possession, parol evidence of the mere *confessions* of the defendant, made 17 years after the deed, that it was taken as security for a debt, was held insufficient.

JOSEPH LATHAM, deceased, in his lifetime, was seized of a house and lot, (No. 318 Water-street,) in the city of New-York, and on the 14th of July, 1806, made his will, at Charleston, S. C., by which he gave one half of the lot to his wife, *Martha*, in fee, one fourth to his son *Gilbert*, in fee, and, if he died unmarried, then to his wife, and one fourth to his nephew, *John Latham*, and his niece, *Mary*. *Gilbert Latham* died unmarried. The widow of the testator mar-

ried *P. Simpson*, who, with the nephew and niece, are plaintiffs. The bill stated, that the testator, in 1785, being indebted to *Gilbert Pell*, in the sum of 1,500 dollars, agreed to give him a mortgage on the lot in question ; that *G. P.* prepared an absolute deed of the lot, which the testator refused to execute, and *G. Pell* agreed to execute a defeasance ; that, on the 4th of *May*, 1788, the testator executed the deed to *G. Pell*, who gave him a certificate that the deed was to operate as a mortgage to secure the payment of the 1,500 dollars, in ten years, with interest ; that the testator then went abroad and continued many years, leaving all his papers with his uncle, *Gilbert Pell*, who, immediately thereafter, took possession of the lot, and of the rents and profits, and fraudulently destroyed the certificate of defeasance ; that *G. Pell* died in 1803, and by his last will devised the premises in question to the defendant, whom he made his executor ; that the rents and profits received by *G. Pell* were more than sufficient to satisfy the debt, and that a large surplus remained in the hands of the defendant. The plaintiffs prayed a discovery of the rents and profits received, and whether the debt had not been paid and satisfied ; that the defendant might account, and be decreed to reconvey the lot, &c.

The defendant, in his answer, admitted the seisin, &c. of *Joseph Latham*, and his will ; but he denied any title in the testator, since the 4th of *January*, 1785. He stated, that he did not know, nor believe, that the testator, *J. Latham*, was indebted to *G. Pell* ; that he knew nothing of any debt, except that *J. L.* executed a bond on the 4th of *January*, 1785, to *G. P.*, for 50 pounds. He denied every allegation relative to the agreement for a mortgage, and a certificate of defeasance. He admitted, that on the 4th of *January*, 1785, *G. Pell* agreed to purchase the lot for 635 pounds, and took a deed, in fee, for the premises ; that *G. Pell* was uncle of the testator, who, soon after the deed was executed, left the state, and was absent for many years ;

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but denied that he left any papers with *G. P.* when he went abroad. He admitted that *G. P.* took possession of the premises, and received the rents, &c. and died in *March* or *April*, 1803, having, by his will, dated in *December*, 1798, devised the premises to the defendant, his executor, who had taken possession, &c. The defendant insisted, that the purchase by *G. P.* was for a valuable consideration, and absolute; that, if intended as a mortgage, there had been no attempt to redeem since 1785; that he found among the papers of his testator, the bond of *J. L.* for 50 pounds; that he could not ascertain the amount of the rents and profits received by his testator, during his life; that the widow was entitled to one third of the rents, as her dower, which had been paid to her; that he had paid large sums for assessments, &c. and for repairs.

Stephen Latham, a witness for the plaintiffs, stated, that, in *August*, 1802, he went with *Joseph Latham*, who had come to *New-York*, from the southward, to his uncle, *Gilbert Pell*, when a conversation took place between them, in which *Joseph Latham* asked *G. P.*, if the rents of the house and lot in question had not been sufficient to satisfy the bond, and that, if they had not been sufficient, he would endeavour to discharge what was due; that *G. P.* answered, that the bond had stood a long time, and that it was out of his power to give any account of the rents; that *J. L.* then told him, that he had promised, when he (*J. L.*) went away, to keep an account, to charge him for repairs, and credit him with the rents; that *G. P.* answered, that he had done so for a long time, until, at length, he got tired of it, and, being angry, he threw all the papers into the fire; and the witness understood that the receipt, or desearance, was one of the papers so destroyed; but, on being asked if the deed was also destroyed, *G. P.* answered in the negative; that *J. L.* then said to *G. P.*, that he must recollect that he had given to him (*J. L.*) an indemnifying receipt, purporting that when the bond was paid, the deed must be given up, all which, the

witness deposed, *G. P.* acknowledged, and did not contradict. That *G. P.* told *J. L.*, that if he would pay 1,000 pounds, he might have the property, but refused to render any account. The witness, also, related a conversation between *J. L.* and *G. P.*, when the former was about going to Carolina, in which *G. P.* said, that as *J. L.* was about going to a sickly place, and might die, and some person might get possession of the receipt, and thereby of the house and lot, that he had better leave the receipt with him, *G. P.*, which *J. L.* said he would do.

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Three other witnesses, examined on the part of the plaintiffs, testified to similar confessions and acknowledgments, by *G. Pell*, that the premises belonged to his nephew *J. Latham*, and that he, *G. Pell*, had taken them as security for a debt.

The witness to the deed of the 4th of *January*, 1785, was examined, who said he did not recollect any deed of defeasance, nor that any thing was said about it. He had some recollection that *J. L.* was indebted to *G. P.*, and that the deed was executed to him on that account; but a written memorandum, signed by him the 19th of *June*, 1804, stated that *J. L.* owed *G. P.* 600 pounds, and upwards, and that *G. P.*, fearful of losing the debt, obtained the deed from *J. L.*, of a house; but whether the sale was absolute and final, or only as security, he could not recollect. The witness was 73 years of age, infirm, and of weak memory.

The cause was argued by *Hoffman* and *Anthon*, for the plaintiffs; and by *T. A. Emmet*, for the defendant.

THE CHANCELLOR. The bill is in the nature of a bill to redeem a mortgage alleged to have been given in *January*, 1785, by *Joseph Latham* to *Gilbert Pell*. The answer sets up an absolute purchase by a deed in fee, and denies the existence of the mortgage. The plaintiffs undertake to establish the charges in the bill by parol proof. This proof consists of confessions made by *Gilbert Pell*, that the deed

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is question was taken and considered by him as a mortgage; and that he kept an account of the rents and profits for a number of years, and then destroyed all those accounts, together with a certificate in the nature of a defeasance, given by him at the time of the execution of the deed.

I am of opinion that the proof is not sufficient to support the bill.

My objection is to the nature of the proof. It consists wholly of certain confessions made by *Gilbert Pell* in certain conversations. There is not a single *fact*, exclusive of those confessions, in support of the charge. *Gilbert Pell* takes a deed, in fee, of the lot in question, in January, 1785, and enters immediately into possession. A subscribing witness to the deed is examined, and he is the person who drew the deed. He has no recollection or knowledge of any certificate, or receipt, or other paper in the nature of a defeasance, though it was understood that *Latham* was indebted at the time to *Pell*. This deed was, as he states, freely and understandingly executed ; and it was acknowledged, in February, 1785, by the grantor, before a judge of the supreme court. From that time to the death of *Gilbert Pell*, in 1803, he possessed and used the property as owner, and since his death the defendant, as devisee, has also possessed and used it as owner. Here is a period of near 30 years, in which the premises in question have been enjoyed under that deed; and it would appear to me to be very dangerous to destroy that title by means of certain parol declarations alleged to have been made by *Gilbert Pell*, in his lifetime, and which no person now living has the means to contradict. I agree to the doctrine in the cases cited, that it is competent to show, by parol proof, that the deed was taken as a mortgage, and that the defeasance was destroyed by fraud or mistake ; and I agree further, that length of time is no bar to a fraud, or to redemption of a mortgage, where the mortgagee has treated it all the time as a mortgage, or where it was originally agreed that he was to enter and keep possession until he

was paid out of the profits. (1 Vern. 418. *Prec. in Chan.* 526. 1 *Powell on Mort.* 411. *Cases temp. Tabb.* 61. 2 *Ves. jun.* 84. 1 *Day's Rep.* 139.) My difficulty is, that there is not the requisite legal proof of any of these allegations.

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There is not a single voucher or document in writing, nor a single fact, or act, or deed of *Gilbert Pell*, that supports the charges. The whole rests on the naked, unassisted confessions of *Pell*, made to, or in the presence of, certain witnesses, about 17 years after he had been in the peaceable occupation of the premises as apparent owner. It was once observed in the supreme court, (6 *Johns. Rep.* 21,) that acknowledgments of the party, as to title to real property, are generally a dangerous species of evidence ; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title, as it would counteract the beneficial purposes of the statute of frauds. That doctrine strikes me as just and sound, and principles are essentially the same in both courts.

The evidence of the existence and destruction of the receipt, operating as a defeasance, is quite lame, even from the confessions of *Gilbert Pell*. The proof is rather negative, and proceeds more from his silence than his acknowledgment: There is another objection to the charge : these alleged confessions were made to *Joseph Latham*, in 1802 ; and yet, at the same time, *Gilbert Pell* refused to render any account, and demanded 2,500 dollars for the lot. This was inconsistent with his other confession of right and equity in *Latham*. But why did not *Latham*, then, prosecute for the land ? He could have made *Pell* disclose the truth by his answer in this court. Instead of which *Latham*, who had already abandoned the lot to *Pell* for 17 years, goes abroad, and leaves his claim dormant, and dies in 1806 ; and the claim is now, after many years, and for the first time, brought forward in this court by his representatives against the representative of *Pell*. It rests entirely on certain conversations, which are extremely liable to be misunderstood or per-

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It appears to me that, under all the circumstances of this case, it would be setting a dangerous precedent, to give effect to this stale claim, upon such uncorroborated and loose confessions.

I shall, accordingly, dismiss this bill, but without costs.

Decree accordingly.

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In the Matter of WENDELL, a Lunatic.

This court having the whole jurisdiction, in regard to idiots and lunatics, it will direct the course of proceeding, on the traverse of the inquisition returned, in such manner as may be most useful and expedient, so as best to inform its conscience, and afford the safest conclusion as to the existence of the fact of lunacy. The lunatic may be brought into court, after the inquisition is returned, and an inquiry be made, by inspection, or an issue may be awarded to ascertain, by a verdict at law, the existence or continuance of the lunacy.

The most usual and proper course is, to have the issue made up and prepared for trial, under the direction of this court, instead of delivering over the record and traverse, after the attorney general has joined issue thereon, to the court of law, as practised in *England*, under the statute of 2 and 3 Edw. VI., which has not been re-enacted or adopted here.

At the time of directing the issue at law, the court will, if necessary, make a provisional order for the care of the lunatic's estate, until the question of lunacy is determined.

On the 19th of August last, a commission, in the nature of a writ *de lunatico inquirendo*, was issued, directed to certain commissioners, to inquire of the lunacy of *A. H. Wendell*, of the town of *Water Vliet*, in *Albany* county. It was founded upon the petition, &c. of *Dow A. Fonda*, and *Francis Lansing*, jun. The commission was duly executed on the 29th of August, and it was found that *Wendell*

was a lunatic, and had been so for thirty years, and that he had considerable real and personal estate; that he had sisters, and several nephews and nieces, by a deceased brother, &c. The writ and inquisition being duly returned and filed with the register, a petition was presented in the name of the lunatic, dated 1st of *September*, praying for leave to traverse the said inquisition, and that an issue might be ordered to be tried at law; that, on the 4th of *September*, a petition was presented by the above named *Dow A. Fonda*, and *Francis Lansing jun.*, and by *John G. Rumney*, that the custody of the lunatic's person and estate might be granted to them, on their giving due security; that, on the 6th of *September*, a rule was entered that the lunatic have leave to traverse the inquisition, in such form and manner, and within such time, as might afterwards be directed.

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THE CHANCELLOR. The order of the 6th of *September* last was entered provisionally, leaving the course of proceeding to be afterwards settled. In *England*, the traverse of an inquisition of lunacy, or idiocy, is now considered as a matter of right under the statute of 2 and 3 E. VI., and it stops the commission at once; and the record is to be carried to the *K. B.*, in order that the traverse may be tried. This was the opinion of Lord *Loughborough*, in the cases, *ex parte Wragg* and *ex parte Ferne*; (5 *Ves.* 450. 832. ;) and the record of such a traverse, and issue thereon, in chancery, and subsequent trial at law, is to be seen in the precedent of *Rex v. Stone*, in *Tremaine's Pleas of the Crown*, 652.; and the proceeding is, also, stated in the case of *Rex v. Roberts*, (*Str. 1208.*) But Lord *Hardwicke* did not seem to consider the statute as operating in so peremptory a manner; and though he was very cautious of extending the prerogative of the crown, in restraining the liberty and property of persons labouring under a charge of lunacy, yet, in the case *ex parte Barnsley*, (3 *Atk.* 184.,) he rejected an application to traverse

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a second inquisition of lunacy, as tending to delay, expense, and oppression ; and he said, in another case, (*ex parte Roberts*, 3 *Atk.* 5.) that if the party was entitled, by law, to the traverse, he need not apply to him, though he thought the custody of the estate, or person, could not be suspended without leave. But we need not stay to discuss the construction of the statute referred to, for the provision in that of 2 E. VI. has not been re-enacted or adopted. The care and custody of idiots and lunatics, being confided to this court, the whole control of the inquisition, and the manner in which that control shall be exercised, would seem to depend entirely on the discretion of the court.

The lunatic may be brought into court, and an inquiry made, by inspection, after the inquisition is returned, as was declared in *Heli's case*; (3 *Atk.* 634. ;) and in the case of returning sanity, this is frequently the course, aided, also, by affidavits and the certificates of physicians. So, on the execution of the commission, the commissioners and the jury have a right to inspect and examine the lunatic. (*Ex parte Southcote, Amb.* 109.) An issue may also be awarded to ascertain, by a verdict at law, the existence, or continuance, of the lunacy, as was done in the case *ex parte Holland*. (11 *Ves.* 10.) If a traverse be tendered and allowed, and the attorney general has filed a replication and taken issue upon it, the course, in *England*, is, undoubtedly, to transmit the record to the *K. B.*, to have the question tried at law. But as the whole jurisdiction of the subject is in this court, the object, in either mode, must be merely *ad informandam conscientiam*, and to arrive at a safe conclusion as to the existence of the fact. The decision of a jury will afford the most satisfactory evidence ; and the only question is, whether the course shall be by an issue made up and prepared for trial, under the direction of this court, or by delivering over to the supreme court the record of the inquisition and traverse, after the public prosecutor shall have been called to join issue upon it, according to the

practice under the *English* statute. I do not perceive the necessity, or utility, of following the latter mode; and the other appears to be preferable, as being more conformable to the ordinary practice of the court, in those cases in which it becomes expedient that a jury should pass upon a matter of fact.

A trial at law is the more desirable, and the more necessary, in this case, since the petitioner's sanity has never been questioned until now, though, according to the finding of the inquisition, he has been a lunatic for thirty years.

I shall, accordingly, direct an issue to try the allegation of lunacy, to be made and prepared by the parties concerned, to be tried at the next circuit court, in and for *Albany* county; and if it shall be found necessary, I shall make a provisional order for the care of the lunatic's estate until the lunacy be determined. This was a precaution taken in the case of *Heli*, just now mentioned.

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Order for an issue accordingly.

The order was, "That an issue be made and settled to try the question, whether *E. H. W.* be a *lunatic*, or *mentally incapable of managing his own affairs*; that the said issue be tried at the next *Albany* circuit; that the counsel for the lunatic, in the first instance, prepare the issue, and submit it to the counsel, or agent of the party suing out the commission; and that, if they cannot agree as to the form, &c. that application be made to the court; that if the counsel for *E. H. Wendell* shall omit to prepare, and serve on the opposite party, such an issue, in six weeks after service of a copy of this order, then the order for an issue shall be deemed discharged."

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BEDELL against BEDELL.

Nov. 17th.

On a bill by the wife against the husband for a divorce from bed and board, on the ground of cruel usage, and for maintenance, the court, under the circumstances of the case, having a due regard to the age and expectations of the parties, decreed a divorce for five years: that the plaintiff, in the mean time, should have the custody and care of the child, a daughter; and that the defendant should pay 100 dollars a year, in half yearly payments, one half to be applied to the maintenance of the plaintiff, and the other half to the maintenance and education of the child, it appearing from the master's report that the defendant was worth about 3,500 dollars, and his annual income about 100 dollars; and the defendant was directed to pay the costs of this suit.

Licentious conduct and misbehaviour of the wife, if existing before the alleged acts of cruel treatment by the husband, will destroy her claim for maintenance.

BILL filed by the wife against the husband for a divorce from bed and board, for cruel usage, and, also, for a maintenance, out of the husband's estate, for herself and child.

It charged that the parties were married in 1807, and between that time and November, 1813, when the plaintiff abandoned him, the defendant was in the habitual practice of beating her, and otherwise treating her in a cruel and inhuman manner; and many instances of cruel treatment were specified. The bill charged that the defendant is addicted to intemperance; and that they have one child, a girl, 6 years of age.

The answer admitted occasional intoxication, and that he struck the plaintiff in 1808, and occasionally, in 1809, and sometimes in 1811, and treated her with more severity than formerly. The defendant admitted that he turned her out of the house, and struck her, and treated her harshly in 1813, but it was owing to a belief of an illicit intercourse between her and T. B., in that year. That when she went away, in 1813, she took away considerable of his property; and he

stated, particularly, the suspicious conduct of the plaintiff in respect to *T. B.*

The cause was put at issue, and much testimony taken; and on the hearing, in June, 1815, a reference was directed to a master to take an account of the estate of the defendant, and the value of what was taken away by the plaintiff.

The master's report stated, that the plaintiff had taken away personal property to the amount of 300 dollars, and upwards; and that the estate of the defendant, exclusive of debts and charges thereon, was worth 3,500 dollars, but would not produce an annual income of above 100 dollars.

The cause came on to a hearing on the report, and generally on the pleadings and proofs.

H. Bleeker, for the plaintiff.

Riggs, contra.

THE CHANCELLOR. Here is enough shown and admitted to justify and require a separation of the parties. But as it is alleged that the defendant is reformed, as to his intemperance, and as the parties are young, it is possible that a temporary separation will be sufficient for correction and admonition. I shall give them an opportunity, at a distant period, of re-entering into their duties, and of seeking for mutual consolation and happiness in conjugal life. The statute authorizes a decree of divorce from bed and board, for unkind treatment, to be for ever, or only for a limited time. The charge set up in the answer, of licentious conduct in the plaintiff, in 1813, would, if true, greatly diminish her claim to maintenance; and if the misbehaviour had existed before the first cruel usage on the part of the defendant, it would have destroyed, altogether, any just claim for maintenance. (*Watkyns v. Watkyns*, 2 Atk. 96.) But the charge in the answer is very materially weakened, and left to rest in doubt and suspicion; and it is to be observed, that the defendant

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was unkind and cruel, and was in the habit of beating his wife, for years before the charge arose.

Under a due regard to the circumstances of the parties, and their future hopes and expectations, I shall decree:

That the parties be divorced from bed and board for five years. That the plaintiff be entitled, during that time, to the custody and care of her daughter. That the defendant pay 100 dollars a year, in half yearly payments, towards the maintenance of the plaintiff, and the child; and that one half go to the maintenance of the plaintiff, and the other half towards the maintenance and education of the child; and that the defendant pay the costs of this suit.

Decree accordingly.

Nov. 17th.

POMEROY against POMEROY.

The 12th section of the act concerning divorces, (sess. 36. ch. 102. 1 N. R.

L. 197.,) relative to *security for costs* to be given by the plaintiff, does not apply where the bill is filed on the ground of *adultery*, though the bill contains, also, a distinct charge of cruel and inhuman treatment.

It seems, that the charges of *adultery* and *cruel treatment* cannot both be contained in the same bill.

BILL by the wife against her husband, for a divorce, on a charge of adultery, and, also, of cruel usage.

I. Hamilton, for the defendant, moved for a rule that the plaintiff cause security for costs to be filed, before the defendant be obliged to answer that part of the bill relating to the cruel usage; he relied on the 12th section of the act concerning divorces. (Sess. 36. ch. 102.)

D. Rodman, contra.

THE CHANCELLOR said, that if the bill had gone only for a divorce from bed and board, and for cruel usage, the statute referred to would have applied, and the defendant would have been entitled to such security. But though the bill had such a charge, it contained, also, a charge of adultery ; and he doubted whether both charges could be contained in the same bill, since the one charge required an answer on oath, and the other did not, and since a confession of the one charge was conclusive, but not as to the other, and as the decrees were essentially different in the two cases. At any rate, he should look, for the purpose of this motion, to the weightier charge of adultery ; and the defendant was not entitled to security for costs in such a case, unless, perhaps, under some extraordinary circumstances. The statute did not apply to such a bill as this, but only to a bill simply for a divorce from bed and board. If security be taken, it must be for the costs of the suit at large, and could not be taken for a distinct ingredient in the bill.

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v.
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Motion denied.

WISER, an infant, &c., against BLACHLY, and the Executors of VAIL.

Nov. 17th
and 18th.

Where a replication is filed, and a cause set down for hearing, without any rule having been entered to produce witnesses, it is a waiver of a replication ; and the defendants are entitled to the benefit of their answers, as if the cause had been set down on bill and answer.

Where a bond, given by a surety for the guardian of an infant, was taken by the surrogate in the name of the people, instead of the infant, the court corrected the mistake, and considered the bond as of equal validity as if taken in the name of the infant.

Where the intention is manifest, this court will always relieve against mistakes in agreements, and that as well in the case of a surety as in any other case.

THIS cause coming on to a hearing, *H. Bleecker*, for the

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defendants, objected to the hearing, on the ground, that to the answers of the executors replications had been filed, and that no rule had been entered to produce witnesses.

Riggs, contra, said, that as the cause was set down for a hearing, without such rule, it was a waiver of the replication, and the defendants were entitled to the benefit of the answers, as if the cause had been set down on bill and answer.

THE CHANCELLOR said, this was the consequence, and the objection was overruled.

The bill was filed against the defendant, *Blachly*, as guardian to the plaintiff, charging him with wasting the personal estate, and the rents and profits of the real estates, belonging to his ward ; and that he was insolvent, &c., and prayed for an account ; and that he be discharged from his trust ; and, also, charging that the testator of the other defendants was surety for the guardian's fidelity, and praying that they might make good whatever the guardian is unable to pay of what was due to the plaintiff.

The answers admitted the guardianship and security as charged, but the *devastavit* and the insolvency were denied, though the guardian stated an account of property received by him as guardian ; and the executors insisted that the bond ought to be sued at law, and there only.

Some proof was taken in the cause.

Riggs, for the plaintiff, contended, 1. That the guardian had received property, and for which he must account, and that it ought to be referred to a master to take an account, and to report whether he be a fit and proper person to continue guardian.

2. That the surety was holden, though the bond taken by the surrogate was incorrectly taken, and not according to the form prescribed by the act, (sess: 25. ch. 110.,) as it was

taken in the name of the people, and not to the infant. That this court will correct such a mistake, and enforce the bond according to the agreement and intention of the parties. He cited 1 *Ves.* 456. 3 *Atk.* 388. 1 *Bro.* 269. 1 *P. Wms.* 60. 277. 334. 2 *Chan. Cas.* 225. *Prec. in Chan.* 309.

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H. Bleeker, contra, said, that the surety was not holden, as the statute had prescribed the form of the bond. If he was, the guardian ought first to be found in default, and unable to account and satisfy, but here was no evidence of any *devastavit*, or default in the guardian.

THE CHANCELLOR. There must be a reference to the master, to take an account of the property which it is admitted, or proved, has come to the possession of the guardian ; and, under the allegations contained in the case, it will be proper for the master to inquire, also, into the fitness and competency of the guardian to continue in his trust. Perhaps it will be premature to take an account of the assets in the hands of the executors of the surety, until the default of the principal, and his inability to pay, are first ascertained. But as to the main point in the case, whether the surety is to be holden, though the bond was taken in the name of the people instead of the name of the infant, I have no difficulty in saying, that it is within the ordinary jurisdiction of this court to correct such a mistake, by holding the party according to his original intention, and to consider the bond as taken to the infant. Where the intention is manifest, this court will always relieve against mistakes in agreements. (2 *Atk.* 203. 1 *Ves.* 317.) The case cited from *Prec. in Chancery* shows, that the court will do it in the case of a surety. Here it is admitted in the answer, and the bond itself is conclusive proof that *Vail* intended to bind himself as security for *Blachly*, the guardian ; and, whether the bond was taken in the name of the infant, or in the name of *the people*, in trust for the infant, it is but matter of form and

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not of substance ; it would be intolerable that such a mistake should prejudice or destroy the rights of the infant.

I shall, accordingly, decree, that the bond, executed by the surety, is to be valid as a security to the like extent as if it had been taken by the surrogate according to the act; that the guardian shall account with the plaintiff for the moneys, estate, and effects of the plaintiff, which have come to his hands as guardian ; that it be referred to a master to take the account, and also to inquire and ascertain whether *B.*, the guardian, be able to pay what may be found due, and whether he has taken due care of the plaintiff and her estate ; and whether he be a suitable person to continue guardian ; and that the question of costs, and all other questions, be, in the mean time, reserved.

Decree accordingly.

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v.
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Nov. 21st.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE CROTON TURNPike ROAD against RYDER AND OTHERS.

An injunction will be granted to secure to a party the enjoyment of a privilege, conferred by statute, of which he is in the actual possession, and when his legal title is not put in doubt.

As where a turnpike company, incorporated with the exclusive privilege of erecting toll-gates, and receiving toll, had duly opened and established the road, with gates, &c.; and certain persons with a view to avoid the payment of toll, opened a by-road, near the turnpike, and kept it open, at their own expense, for the use of the public, by which travellers were enabled to avoid passing through the gate and paying toll to the plaintiffs; the court granted a perpetual injunction to prevent the defendants from using, or allowing others to use, such road, and ordered the same to be shut up.

THE bill, in this case, charged, that the plaintiffs were incorporated by the act of the 6th of *April*, 1807, for the purpose of making a turnpike road from the house of *Thomas B. Sears*, in the town of *South East*, to the meeting house in *Stephentown*, under the regulations of the general act relative to turnpike companies, passed the 13th of *March*, 1807; and that, by a supplementary act, passed the 18th of *March*, 1808, in favour of the plaintiffs, they were authorized to extend the road so as to intersect the *Highland Turnpike* at *Mount Pleasant*; that the road was laid out, completed, inspected, and the toll-gates erected according to the act; and that the road, so made, was established by the act of *April* 8th, 1811; that the defendants and others combined to injure the plaintiffs in the enjoyment of their road, and the privileges of it; that all the defendants, except *F. Graham*, purchased, in fee, in 1812, of *W. Haight*, a strip of land three rods wide, containing one and a half acres, for 250 dollars, which sum was raised by contribution among them; and this land was purchased to be used as a road, and to avoid the toll-gate on the road of the plaintiffs; that the defendants caused the strip of

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land, so purchased by them, to be laid out, by the commissioners of highways, in June, 1812, as a public highway, and the order of the said commissioners was recorded the 17th of November, 1812; that the by-road, marked 1, 2, 3, on a map (a) of the road of the plaintiffs, annexed to their bill, is unnecessary, the turnpike affording a way as good and as easy, and being only five chains and one link longer; that the whole object of the defendants in laying out their road, marked 1, 2, 3, on the map, was to avoid the toll-gate; that, on appeal to the court of common pleas, on the 21st of November, 1812, the judges of that court reversed the order of the commissioners for laying out the road; that the plaintiff soon after caused the by-road to be obstructed, and defendants again opened it; and by that means much travelling is diverted from the gate on the road of the plaintiffs, by which they have lost, in tolls, 1,000 dollars; and that the defendants persist in refusing to discontinue the by-road, so marked 1, 2, 3. The plaintiffs prayed

(a) The following diagram, taken from part of the map, will be sufficient for understanding the facts in the case, and the decision of the court:



that the defendants might account, and pay to them the amount of the tolls so lost ; and might be decreed to discontinue their said by-road, or that part thereof marked 1, 2, 3, on the map, and to close up the same, so as to prevent all persons travelling on the turnpike from using it ; and that the defendants may be perpetually enjoined not to open or use, or permit to be opened or used, as a road, for public use or travelling, the said by-road, so marked 1, 2, 3, &c.

The defendants put in a joint and several answer, admitting that the plaintiffs were incorporated under the acts mentioned, and that the turnpike road was laid out by the commissioners, duly appointed under those acts, who reported the road well made according to the acts, and that the governor authorized the erection of the toll-gates, &c. ; but the defendants denied that the road was made as the act prescribed. They admitted the facts charged in the bill, as to the purchase of the piece of land, marked on the map 1, 2, 3, but denied that the purchase was made with any fraudulent intent, or with a view to injure the plaintiffs, or to enable themselves, or others, to avoid paying toll ; but that they purchased it for their benefit, and because it would be an advantage to the country to have it laid out as a road, it being more convenient for going to the new landing of *Sparta*. They admitted that the new road, so laid out by them, might, and did, enable persons to avoid passing through the turnpike gate, and paying toll to the plaintiffs ; and that the new road marked 1, 2, 3, was only four chains and one link shorter than the road through the toll-gate ; but they denied that the road was so laid out by them for the purpose and intent charged in the bill. They admitted that the commissioners of highways had declared the road a public highway, and that their order was recorded the 17th of November, 1812 ; and that the order was reversed, on appeal, by the court of common pleas, because maintaining the road would be a great public burden ; that the road had been since kept open for public use and travel, though

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not at the public expense, but that it was so kept open only, as that travellers were not hindered from using it ; and they denied that they, or other persons, had used the road for the purpose of avoiding the toll-gate. They admit that the plaintiffs obstructed the by-road, and that one of the defendants (*B. Ryder*) removed the obstruction ; that the road was, afterwards, repaired by them, and for their use, and kept open for the use of the public, as they did not conceive themselves authorized to obstruct it, &c.

Munro, for the plaintiffs.

T. A. Emmet and *Sampson*, for the defendants. They cited 1 *Vesey*, 477. 2 *Vesey*, 414. 2 *Atk.* 391.

THE CHANCELLOR. The plaintiffs have shown a clear and undisputed right, by statute, to the taking of toll at the gates, and for the use of the turnpike road mentioned in the pleadings. They were, likewise, at the commencement of the suit, in the actual possession and exercise of that exclusive right ; and the question is, whether the establishment of the open and common road, designated on the map by the figures 1, 2, 3, be not a disturbance of that right, amounting to a private nuisance.

There can be no question as to the right of the plaintiffs. It was given to them by the acts of the legislature of the 13th of *March*, 1807, and 18th of *March*, 1808 ; and it is shown and admitted, that they conformed to the conditions upon which the grant was made. The road was duly laid out, and report duly made by commissioners appointed according to law, and the gates were then erected in pursuance of the governor's license. The road, as worked and constructed, was also established by the act of the 8th of *April*, 1811. The defendants admit that they combined together to purchase jointly of *William Haight*, the strip of land on which the road marked 1, 2, 3, complained of, was establish-

ed and opened. They admit the consideration of 250 dollars was raised by contribution, and a deed in fee taken to all of them, except *Frederick Graham*, on the 10th of December, 1811. They admit that they purchased the land to be laid out as a road for their benefit, and because it would be a public advantage. They admit that this new road has not been established as a public road; and that the distance by that road from *A.* to *D.*, on the map, is only 4 chains and 1 link shorter than the distance between the same points by the way of the toll-gate. They admit that the new road has been kept open for public use and travel, and maintained as such by private expense, by not impeding travellers from using it; and they admit that this road may, and does, enable persons to avoid passing through the gate and paying toll to the plaintiffs. After these admissions, it is in vain for the defendants to allege that the road was established without any views injurious to the rights of the plaintiffs. The facts speak for themselves; and I think it is impossible for any person to cast his eye upon the map, which is made an exhibit in the cause, without being struck, at once, with the conviction, that the injury is direct, palpable, and inevitable, and that, if no such turnpike gate existed, no such new road would have been purchased, made, and kept open.

It is, then, a plain case of a material and mischievous disturbance of the plaintiffs in the enjoyment of the statute privilege, which was granted to them by the legislature for public purposes, and founded on a valuable consideration.

The only question is as to the remedy, and this appears to me to be equally certain.

It is settled that an injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal title is not put in doubt. The *English* books are full of cases arising under this head of equity jurisdiction. (*Bush v. Western, Prec. in Chan.* 530. *Whitchurch v. Hide*, 2

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Atk. 391.) But I need not enter into this discussion, for the point has been recently settled in this state, in the case of *Livingston and Fulton v. Van Ingen and others*, (9 Johns. Rep. 507.,) and I shall rest upon the authority of that case, and upon the application of the principles on which it was decided.

The equity jurisdiction in such a case is extremely benign and salutary. Without it, the party would be exposed to constant and ruinous litigation, as well as to have his right excessively impaired by frauds and evasion.

If such a contrivance as this case presents, is to be tolerated, all our statute privileges of the like kind, on which millions have been expended, would be rendered of little value, and the moneys have been laid out in vain.

I shall, accordingly, decree, that the defendants be perpetually enjoined from opening or using, or permitting to be opened and used, as a road for public use or travel, the road designated on the map by the figures 1, 2, 3; and that the same be closed up so as to hinder persons travelling on the turnpike road from using it as an open road; and that the defendants, except *Frederick Graham*, pay the costs of this suit; and that the bill, as to him, be dismissed.

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LANSING
v.
CAPRON.

LANSING against CAPRON AND OTHERS.

Nov. 28th.

Where a mortgage is given to secure a sum, payable in instalments, with interest, and, on default in payment of the first instalment, a bill is filed by the mortgagor, the defendant will not be allowed to stay proceedings, on bringing into court the principal and interest due, with the costs which had accrued, unless he also put in an *answer*, confessing the debt, &c. or consent to a decree of foreclosure, to remain subject to the further order of the court upon a subsequent default.

And it seems, that, in such case, if the subsequent instalments are punctually paid, the defendant will not be charged with the further *costs*.

THE bill, which was filed the 30th of *October*, 1815, stated, that the defendant, *Capron*, on the 30th of *September*, 1813, mortgaged to the defendants, *Lockwood* and *McPherson*, certain lots of land in *Albany*, to secure the payment of 1,890 dollars, being the consideration money for the purchase of the lots of them, on that day; the amount was to be paid in three instalments, of 630 dollars each, with interest, on the 30th of *September*, 1814, the 30th of *September*, 1815, and the 30th of *September*, 1816, the interest to be paid annually. That the mortgage contained a power of sale, and was registered the 29th of *October*, 1813. That the defendant, *Lockwood*, on the 8th of *April*, 1815, assigned over all his interest in the mortgage to *McPherson*, who assigned over the mortgage to the plaintiff, for 1,318 dollars and 82 cents. That *Capron* omitted to pay the principal and interest that became due, so that the estate of the plaintiff became absolute at law; and he prayed that the principal and interest due, and to become due, might be decreed to be paid, with costs, or that the property mortgaged should be sold, &c.

J. V. N. Yates, in behalf of *S. Stafford*, the assignee of the mortgagor, now moved that the proceedings on the part

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of the plaintiff be stayed, on paying into court the instalments due, with the interest and costs. He admitted that the defendants had not appeared or answered. The affidavit of *Stafford* was read, stating that he was the owner of the equity of redemption, and that only one instalment was due, with interest, which he was ready to pay, with interest and costs.

The counsel cited the act for the amendment of the law, 1 N. R. L. 515. sess. 36. ch. 56. s. 6. *Stra.* 515. 814. 957. 1 *Atk.* 518. 2 *Wm. Bl.* 906. *Barnes*, 288. *Tidd's Pr.* 485, 486. 6 *Term. Rep.* 399.

J. V. Henry, contra, contended, that the plaintiff was entitled to an answer, and a decree of foreclosure, to be entered at the expense of the defendants, or of the party entitled to redeem, and to remain as a security against future defaults.

THE CHANCELLOR. It appears from the authorities cited on the part of the defendants, to be settled in the courts of law, that in an action of debt upon a bond, with a penalty for the payment of money by instalments, when only part of the instalments are due, the defendants may bring into court the money, with the costs accrued. This is held to be within the equity, though it is not within the letter, of the statute of 4 Ann. ch. 16., and from which our act was taken. That statute relates to the bringing in the *whole* amount of the condition of the bond pending the action, so that the bond may be discharged. But in those cases the permission is upon terms, by allowing the plaintiff to enter judgment for the penalty, to stand as a security for the future instalments. The reason assigned for this permission to the plaintiff is, that the bond is forfeited, and become absolute at law, and the plaintiff is entitled to the benefit of that legal advantage so far as to take judgment for the penalty, to stand as a further security; and because it is not reasonable that the obligee should be put to a new action for every fresh default. The principle, at law,

has considerable, though not entire, application to this case. There is no need of the entry of a decree of foreclosure to give security to the debt, for the lien subsists, and its value is increased, by every payment. But, on the other hand, the institution of new suits in this court, on every default, is more expensive, and may be difficult, by the change of parties, in relation to the fund ; and it is the policy of this court to prevent multiplicity of suits. It is, therefore, reasonable, since the plaintiff has been put to his suit to recover the instalment due, that the party applying should put in an answer, confessing the debt, or consent to a decree of foreclosure, to remain subject to the order of the court upon a subsequent default ; and that the question of costs, on taking such a decree, be subject to the like order. If the future instalments be punctually paid, I shall, probably, not charge the defendants with the further costs.

I shall, therefore, order, that the party applying have leave to bring into court the principal and interest now due, together with the costs hitherto accrued, on his enabling the plaintiff, by answer or consent, to take a decree of foreclosure on the terms aforesaid.

Order accordingly.

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SCHIEFFELIN against STEWART AND OTHERS.

December 2d.

An executor, administrator, or trustee, is not allowed to make any gain, profit, or advantage, from the use of the trust funds.

If he negligently suffer the trust moneys to lie idle, he is chargeable with simple interest.

If he convert the trust moneys to his own use, or employ them in his business or trade, he is chargeable with compound interest.

Where an administrator employed the moneys belonging to the intestate's estate, in trade, for his own benefit, of the profits of which he refused to give any account, the master, in stating an account, after allowing a reasonable time for the settlement of the estate, charged compound interest, making annual rests in the accounts, for that purpose, which was confirmed by the court.

JOSEPH HOPKINS, of the city of New-York, died, in July, 1803, intestate, leaving a widow and several infant children. The plaintiff and Elijah Ferris, with the widow, were appointed administrators of the estate; and the plaintiff was appointed guardian to the children, who are still under age. The principal burden of the administration devolved on the plaintiff, and the goods and effects of the intestate, to a large amount, came into his hands. He had paid out large sums in discharge of the debts of the intestate, and for the maintenance of the children; and for his agency in the administration he claimed to be allowed a commission out of the estate. Considerable sums belonging to the estate still remained in the hands of the plaintiff, and he was desirous to adjust and close the accounts, and, after deducting his reasonable charge and commissions, to pay over the residue to the children, or to their guardians. The bill stated that the plaintiff could not come to an adjustment and settlement to his accounts, without the aid of this court; and he, therefore, prayed, that an account might be decreed to be taken under the direction of the court, that he might be allowed a reasona-

bile compensation for his great care and trouble in relation to the estate, and the proportions of the children, &c. and for such other relief, &c.

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The defendants, by their answer, submitted to an account, &c. but resisted the plaintiff's claim for commissions, and prayed that the plaintiff might be decreed to pay over the moneys belonging to the estate, in his hands, with interest, &c.

The cause being at issue, several witnesses were examined, and an order of reference was made to a master, to take and state an account, &c. The master's *report* contained an account of all the moneys collected and paid by the plaintiff, as administrator, from the 8th of *September*, 1803, when the administration was granted, to the time of taking the account of both the real and personal estate of the intestate. It stated the balance in the hands of the administrator, from year to year, and of the interest thereon, and the total amount due, at the date of the report, (6th of *February*, 1815,) from the plaintiff to the representatives of the intestate, for principal and interest, being 59,658 dollars and 68 cents. The master, also, stated, that he allowed the plaintiff, from the 8th of *September*, 1803, to the 6th of *July*, 1805, for the settlement of the estate; the last debt of any magnitude, due from the intestate, being paid by the plaintiff on the day last mentioned; that, from that day until the time of the report, very large balances, and at no time less than 33,000 dollars, constantly remained in the hands of the plaintiff, without producing any benefit or advantage to the estate. That all the sums paid after the 16th of *July*, 1805, were moneys advanced by the plaintiff, with one or two trifling exceptions, to the different heirs and their guardians; that he, the master, therefore, made annual *rests*, commencing the year from the last-mentioned day. That, from the vouchers submitted, on taking the account, and from the examination of the plaintiff, it appeared, that on the 16th of *July*, 1805, and before that period, the plaintiff kept his account, as administrator,

1815. with the bank of *New-York*, and continued it there, until the 6th of *March*, 1806, when he transferred the same to the *Manhattan Bank*, where it was continued to be kept until *May*, 1807. That a small part only of the funds belonging to the estate, and in the hands of the plaintiff, were, at any time during the above periods, deposited in either of those banks. That, from *May*, 1807, to the time of accounting before him, (the master,) the plaintiff had not kept any account, as administrator, with any bank ; nor had he kept the moneys belonging to the estate, which, from time to time, came into his hands, separate and distinct from his own moneys ; but, on the contrary, had blended the same with his own private property, and had used and employed the money belonging to the estate in his business or trade, and had loaned large sums thereof to other persons ; and all this without accounting to the estate, either by way of interest or otherwise. That in making the yearly rests, he, the master, charged the plaintiff with *compound interest*, commencing from the 16th of *July*, 1805, on the balance then remaining in hand ; i. e. one year's interest was calculated on such balance and added to the balance of principal due on the 16th of *July*, 1806, and both made principal, upon which aggregate sum interest was again calculated for another year, to the 16th of *July*, 1807, and added to the balance of principal due on that alone, and so on, for each year, during the whole term.

The following *exceptions* were taken to the *report* of the master : 1. That the master has charged the plaintiff with *compound interest*, upon balances remaining in his hands subsequent to the 16th of *July*, 1805.

2. That he has charged him with any interest at all.
3. That he has refused to allow the plaintiff any commissions, or compensation, for his care and trouble.
4. That he allowed the plaintiff time for settlement of the estate, only from the 8th of *September*, 1803, to the 16th of *July*, 1805.

5. That he has certified that the plaintiff used and employed the money belonging to his intestate's estate in his business or trade, whereas the pleadings and evidence in the cause do not warrant such a conclusion.

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Van Vechten and *H. Bleeker* argued, for the plaintiff, in support of the exceptions. They cited *1 Vesey*, jun. 99. 2 *Atk.* 410. 534. 604. *Prec. in Ch.* 254. 1 *Bro.* 375. 384. 3 *Bro.* 74.

Henry, contra, cited *4 Vesey*, 620. 7 *Vesey*, 129. 11 *Vesey*, 59. 99. 12 *Vesey*, 388.

THE CHANCELLOR. As the plaintiff took no exception to the testimony taken before the master, and has not shown, by affidavit, what that testimony was, nor called upon the master to report the facts, I have a right to presume, that the master had sufficient evidence before him to warrant the conclusion, that the plaintiff had used and employed the money belonging to the estate in his business or trade. The master says, that the fact of the appropriation of the assets by the plaintiff to his own use, appeared from the vouchers submitted in taking the account, and from the examination of the plaintiff. How can I say, then, that this allegation is not correct and true? I am bound, as the case is now before me, to consider every fact stated in the report to have been duly established by competent proof; and the only real question in the case is, whether the charge of compound interest be proper.

It has been settled, by repeated decisions, that executors and administrators are not entitled to any commission for executing their trust; and it is equally well established, that they must, at all events, pay interest upon moneys of the estate converted to their use. These two points I was led to examine, with much care, in the cases of *Dunscomb* v.

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Dunscomb, and of Manning v. Manning,†* and to which it will now be sufficient for me to refer. The only point worth considering, is the compound interest which the master has allowed.

**Ante*, p. 508.
 †*Ante*, p. 527.

No just complaint can be made of the time from which the computation of interest began. The plaintiff was allowed nearly two years to settle the estate, without being chargeable with interest. For a considerable part of that time he had a large balance in hand, and the time was amply sufficient, in this case, to close the concerns of the administration, and the debts were all paid within that time, with one or two trifling exceptions. It was the duty of the plaintiff, from that time forward, to have made distribution of the assets, or placed them in a situation to become productive, and to accumulate for the heirs. He did neither, but employed the money in his own business, or trade, or in making large loans for his own benefit; and as he has not disclosed (as he might have done to the master) what were the profits of the assets so employed, it appears to me, as well on principle as on authority, that he is justly chargeable with the interest contained in the report. The only way for the plaintiff to avoid this conclusion, was by fairly disclosing what he had made by the use of the money.

The courts were, anciently, quite lax on the subject of these personal trusts, and allowed executors to convert the moneys of the testator to their own use, without any account for interest. This must have been the source of great abuse, and was unjust towards the *cestui que trust*. With such a pecuniary privilege, the office of trustee, as Lord Loughborough expressed himself, would be canvassed for. This blemish in the English jurisprudence was corrected as early as the case of *Ratcliffe v. Graves*, (1 Vern. 196. 2 Ch. Cas. 152,) in which the Lord Keeper held, and, as it is said, against many precedents, that the administrator must pay interest for the moneys of the estate employed in his own business; and he laid down this principle, which runs

through all the subsequent cases, that *an executor ought not to turn the money to his own private advantage*. The rate of interest is not stated; and, from different reports of that case, it is uncertain whether the money was employed by the administrator in trade or in loans. The recognition of the principle was, however, a great improvement; but the modern cases have felt the necessity of explaining and defining the duties and responsibility of the trustee with more precision, in order to give greater efficacy to the just and salutary doctrine, that a trustee shall never be permitted to make gain to himself of the trust property.

In *Newton v. Bennet*, (1 Bro. 359.) the executor mixed the testator's money with his own, and applied it in the course of his trade; and the master, in taking the account, made rests every year, and reported a large balance against the defendant; and the question was, whether he should pay interest *for the sums, from time to time, in his hands*, and it was decreed that he should. In this case I should conclude, that compound interest was allowed, though the making of periodical rests, in taking an account, seems not, of itself, necessary to imply it. Accounts have frequently been directed to be taken with annual rests; (2 Atk. 410. 534. 6 Bro. P. C. 319. old edit.;) perhaps, to see whether interest ought to be charged, or to relieve the defendant in the application of his payments; and in one instance they were expressly directed to be made without prejudice to the question of interest. (16 Vesey, 97.) Whatever might have been the fact, in the case above cited, it is certain that the allowance of compound interest is often essential to carry into complete effect the principle of the court, that no profit, gain, or advantage, shall be derived to the trustee from his use of the trust funds. All the gain must go to the *cestui que trust*. This is the true equity doctrine. It secures fidelity, and removes temptation; and it is the ground of this allowance of annual rests, in the taking of the account, where the executor has used the property, and does not dis-

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1815. close the proceeds. The principle was more clearly enforced in *Treves v. Townshend*, (1 Bro. 384.,) which was the case of the assignee of a bankrupt who suffered the money of the estate to lie idle for years with his private banker. The Chancellor considered money so placed as answering the purpose of credit and trade, and though 4 per cent. was the usual interest of the court, in a case of mere neglect to pay, yet it was presumed that the money was worth 5 per cent. to the assignee, and he was held to account for all the gain; and 5 per cent. interest was, accordingly, decreed, with costs. The same rule appears in a variety of other cases, (1 *Vesey*, jun. 89. 4. *Vesey*, 620. 11 *Vesey*, 58.,) in which the increase of interest to 5 per cent. was given to meet a presumed gain. In *Pocock v. Reddington*, (5 *Vesey*, 794.,) an executor having been guilty of a breach of trust by selling out stock, and dealing improperly with the trust money, the *cestui que trust* was allowed the option to have the stock replaced, or the proceeds of the sales, with interest at 5 per cent., or more, if more had been made by it. The observations of Lord *Alvanley*, in that case, are strong and impressive. The defendant "had very imprudently, and, he must say, very improperly, taken upon himself to lend the money of his ward to his own friends, and upon personal security, and for that purpose he sold out stock," &c. "That was a transaction that it was impossible to permit to pass without animadversion. He had no right to put it in that hazard. No man is justified in putting the property, of which he is trustee, in jeopardy. Therefore, he must answer for the money with what he may be supposed reasonably to have made; and if he made more, he must answer for that too."

But there are cases which not only contain the general principle, that a trustee using the trust money must account for all the profit of it, but, in order to reach that profit when it is not otherwise ascertained, they adopt the very rule of computation contained in the report before us.

In *Foster v. Foster*, (2 Bro. 616.) the defendant was executor of a receiver, and the money was derived from the rents and profits of land ; and the master was directed to compute interest, at 4 per cent., *on the balance he should each year find* in the hands of the receiver, and, also, of the executor. In *Raphael v. Bochm*, (11 Vesey, 92.) the direction was to take an account against the executor, who was a trader, and to compute interest, at 5 per cent., on moneys in his hands from the time he received it, and in such computation to make half yearly rests for the very purpose of allowing compound interest. This was carrying the rule far beyond the present report, and the case led to a full and able discussion of the whole principle ; and the general rule was sanctioned by Lord *Eldon*, under the influence of all that caution and anxious inquiry for which he is distinguished. It was declared, in that case, to be the general understanding of the masters, that where rests were directed to be made in taking an account, they were to be made with the view of computing compound interest ; and it was admitted by the counsel, who opposed the allowance, that if a trustee had made, or if there were ground to infer that he had made, compound interest, or more, he must account accordingly. The Chancellor observed, that the charge of compound interest, in that case, was consistent with every view of moral justice ; and that the court would shamefully desert its duty to infants, by adopting a rule that an executor might keep money in his hands without being answerable *as if he had accumulated*. The same rule was, afterwards, adopted by Sir *Wm. Grant*, in *Dornford v. Dornford*, (12 Ves. 127.)

It would be easy here to show, as was done in that case, the injustice to the infants in denying compound interest, and the direct gain that would be permitted to the plaintiff. Thus, in *July*, 1805, he had in hand 33,000 dollars of moneys belonging to the estate, and no debts to pay. In *July*, 1806, he received, (as we must presume,) for the use of that fund, in his trade and by his loans, at least, the simple

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interest, or 2,310 dollars. That sum he will, then, retain in his business for nine years, or to the taking of the account, free of interest. The next year, or *July*, 1807, he receives another year's interest, and will then have in hand, of interest, 4,620 dollars, to be used for his own advantage, for eight years, free of interest. The third year he will have in hand near 7,000 dollars, to be retained for seven years, without interest, and so on down to the date of the report. The fund, instead of accumulating for the benefit of the infants, accumulates for his benefit. In this way, as Lord *Eldon* observed, the property would be nearly as beneficial to the executor as to the infant, and this would overthrow the principles of the court. Such a consequence cannot be endured. A man in trade could afford a large premium for letters of administration upon a rich estate, especially if the infant heirs were very young. What temptation would thus be held out to delay and negligence in rendering an account! What inducements to trustees to employ the trust moneys in their own private speculations and trade, to the hazard of the loss of the whole fund!

In the ordinary case, between debtor and creditor, compound interest is not recoverable. This point I had occasion to examine fully in the case of *The State of Connecticut v. Jackson.** But here a charge of such interest becomes indispensable to enable us to reach the gain or profit which the plaintiff ought to refund.

It cannot be amiss to observe, at the conclusion of this opinion that the civil law was not forgetful of the justice and necessity of such a strict provision against trustees who converted the trust moneys to their own use. While it gave ordinary interest against the tutor, who suffered the pupil's money to lie idle; yet, if he converted it to his own purposes, he was held responsible for interest *non ex more regionis*, (as 5, or 4, or 3 per cent.,) *sed gravissimas vel maximas usuras*, which different commentators fix at 12, or 8, or 6 per cent., while 4 per cent. was the ordinary interest. (*Dig.*

* *Ante*, p. 13.

3. 5. 38 *Ibid.* 26. 7. 6. and 10. *Code,* 5. 56., with the notes of *Gothofredus*, and *Veet's Comm. ad. Pand. lib. 26. tit. 7. s. 9.*) Such concidence, on this particular point, between two such systems of jurisprudence, serves, of itself, to show that the principle adopted has a clear foundation in natural justice, or, at least, is recommended by the obvious dictates of public policy. Indeed, it appears to me to be an interesting fact, that the refusal of compound interest, in ordinary cases, between debtor and creditor; the denial of compensation to executors and other trustees; the charge of simple interest against them when they negligently suffer the trust moneys to lie idle; and the charge of extraordinary interest against them when they convert it to their own use, are distinct principles, not only well-settled in the *English law*, as I have abundantly shown in this, and in the other cases referred to, but they all existed as known principles in the civil law of *Rome*. And those principles, from the prevalence of that code, are now, probably, acknowledged and settled, as part of their common law, in most of the continental nations of *Europe*.

This historical fact is calculated to inspire us with much respect for these principles, independent of their practical utility in securing the diligence and fidelity of trustees.

The exceptions to the report must, accordingly, be overruled.

Exceptions overruled.

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Dec. 18th.

PARKER AND BLISS *against* GRANT AND OTHERS.

A decree fairly and regularly obtained, by default, for want of an answer, will not be set aside to let in a defence founded on a fraudulent speculation.

The application, in such case, is to the grace and favour of the court; and the defendant must show that he is deserving of favour.

THE *petition* of the defendants stated, that the plaintiffs filed their bill on the 11th of *April* last, and it set forth the substance of it, which related to fraud alleged in the purchase of a lottery ticket that had drawn a prize; that an injunction was issued, &c.; that the defendants, intending to defend the suit, employed *D. Rodman* as their solicitor, who gave notice of his appearance on the 13th of *April*; that he prepared an answer to the bill, the substance of which was set forth in the petition; that the answer was engrossed when the solicitor was informed that the bill had been amended; that they understood that the amendment was decreed to be irregular, and expunged; but, on special motion for that purpose, on the 8th of *May* last, the *amendment* was re-inserted, which the petitioner set forth, and that that it was of the very essence of the bill, and without which it could not be sustained; that, on the 8th of *May*, an order was made that the defendants answer the bill, as amended, in six weeks, or that the bill be taken *pro confesso*. That, on the 17th of *July* last, the bill was taken *pro confesso*, for want of an answer, and that the amount of the prize was brought into court and invested in stock, by order of the court, to abide the event of the suit. That, by the decree of the court, of the 30th of *November* last, the stock was directed to be transferred to the plaintiffs, and the defendants were decreed to pay the costs: that from the time of filing the bill, until within 12 days last past, the defendants were not apprized that any proceedings were had against them, for want of an answer, or that the bill had been taken *pro confesso*; but were then informed that their solicitor had suffered a continued series of neglects; that he had received

repeated personal notices in writing from the solicitor of the plaintiffs, of the different steps taken in the cause, and had never communicated any of them to the defendants, but suffered them to believe that their defence was duly attended to, and that no *laches* had been suffered to their prejudice : that the defendant, *Root*, to the knowledge of their solicitor, had resided continually in *Albany*, and that *Cutler* resided in the same place until the 26th of *May*, when he removed to *New-York*; and that the defendant, *Grant*, resided in *Albany* until the 1st of *May*, when he left it, but had been there frequently since, and now resided in *New-York*; and that, since the filing of the bill, their solicitor had conversed very often with the defendant, *Root*, about the suit, and had been paid, several times, several large sums of money, for fees, &c.; that the solicitor is poor, and unable to refund to the defendants any damages, &c. The petitioner prayed for leave to answer, &c. The petition was sworn to by the defendant, *Root*, who added that he believed, and was so advised by his counsel, that the defendants have a good and substantial defence on the merits.

I. Hamilton, on reading the petition, moved that the defendants have leave to put in their answer, &c.

Henry, contra, read the deposition of *D. Rodman*, stating that he was retained as solicitor for the defendants; that he entered an appearance and prepared an answer, according to instructions in the handwriting of the defendants; that when he showed the answer to *Grant*, he said it was not correct, and that *Root* had no interest in the purchase, and that he would write to *Cutler*, at *New-York*, and abide his decision; that, in *October* last, the deponent, being in *New-York*, saw *Cutler*, and informed him of the objections of *Grant*, and *Cutler* said he would see *Grant* and have the matter fixed; that since that time he had not heard from *Grant* or *Cutler*; that he had repeatedly informed the defendant, *Root*, of the

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state of the suit, and of the impossibility of filing an answer as prepared, and that the defendants must agree in their story ; that *Root* had often promised to write to *Culer*, and have every thing arranged ; that the deponent had received no more than 40 dollars from the defendants ; that he had used the utmost diligence to have the answer filed ; and the omissions and neglects, if any, were solely attributable to the defendants.

THE CHANCELLOR. A motion was made, on the 11th instant, to set aside the decree which was entered on the 30th of *November*, and to permit the defendants to answer. That motion was unaccompanied with any affidavit of either of the defendants, and no satisfactory reason was given why none was produced ; and the affidavit of Mr. *Henry*, the solicitor of the plaintiffs, stated the history of the cause, and the repeated delays of the defendants, and the indulgence granted by him from the 8th of *May*, when the order to answer was entered, to the 30th of *November*, when the final decree was pronounced by default, after the cause had been regularly set down for hearing. The motion was, consequently, denied.

The same motion is now renewed, and accompanied with an affidavit of one of the defendants, disclosing the merits of the defence. This is an application to the grace and favour of the court, to let in a party to defend, after a decree has been regularly entered against him by default. To whom the neglect to defend in proper time is to be attributed, I am not able to say, as the defendants, and their solicitor, accuse each other of that delay. But I am now put in possession of the real defence, and, admitting all that is stated in the petition, I am of opinion, that the purchase of the ticket was a fraudulent speculation, undeserving of favour. I will not set aside a decree fairly and regularly obtained, to let in such a defence. The motion is, therefore, denied, with costs.

Order accordingly.

END OF THE CASES.

I N D E X.

A ACCOUNT.

Vide FRAUD, 5, 6. INTEREST, 1. 3, 4.
MORTGAGE, IV. PARTNERSHIP, 3,
4, 5.

ADMINISTRATION AND ADMI- NISTRATOR.

Vide EXECUTOR AND ADMINISTRATOR.

ADULTERY.

1. Where a bill for a divorce on the ground of *adultery*, is taken *pro confesso*, or the defendant, in his answer, admits the adultery charged, and a reference is made to the master, under the 3d section of the act concerning divorces, (2 N. R. L. 197, 198.) to take the proof of the adultery, and to report thereon, &c.; by the proof to be taken by the master, is meant legal proof generally; and he may, therefore, receive proof of the *confession* of the defendant, which must, however, be connected with, and supported by, other proofs, before the court will decree a divorce *a vinculo matrimonii*. *Betts v. Betts*, 197

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2. But by the 51st rule of the court, June, 1806, evidence of the confessions of the defendant is not admissible at all, on a feigned issue awarded to try the fact of adultery. Whether this rule has not gone too far in rejecting this species of proof altogether? *Quære*, ib.
3. To give the court jurisdiction to decree a divorce, *a vinculo matrimonii*, on the ground of adultery, when the marriage was solemnized abroad, it must clearly and distinctly appear, from the bill, that *both* parties were inhabitants of the state at the time the adultery was committed. *Miz v. Miz*, 204
4. To entitle a party to sustain a bill for a *divorce*, he must be an actual and *bona fide* inhabitant of the state at the time of the adultery committed, and at the time of exhibiting the bill. *Williamson v. Parisien*, 389
5. Where the plaintiff, a native of *Scotland*, married his wife in *New-York*, in 1780, and left her in 1784, and went to the *West-Indies*, and continually resided abroad, excepting only a short visit to *New-York*, in 1792, until the time of filing his bill for a *divorce*, in 1813, a period of 28

- years; it was held that he was not an inhabitant of the state, within the words or intent of the act, *ib.*
6. A decree of divorce, *a vinculo matrimonii*, though the adultery is fully ascertained, is not granted, of course, in all cases. *Williamson v. Williamson*, 488
 7. If the husband, subsequently to the adultery, cohabits with his wife, with knowledge of her guilt, it is a remission of the offence, and a bar to a divorce, *ib.*
 8. Lapse of time, also, or a long acquiescence of the husband, without any disability on his part to sue, will be a bar to a prosecution for a divorce, *ib.*
 9. As, where a husband having been absent from his wife for eight years, in a foreign country, and she, supposing him to be dead, married another person; and the first husband, afterwards, returned, and finding his wife cohabiting with her second husband, without taking any steps to obtain a divorce, went abroad, and continued absent for twenty years, and then returned again, and filed a bill for a divorce against his wife, who was living with her second husband, by whom she had several children; the court, though the counsel of both parties consented to a decree, dismissed the bill, with costs, *ib.*

Vide DIVORCE.

AFFIDAVITS.

Vide PRACTICE, IV. 16, 17, 18.

AGENT.

1. An agent or trustee, undertaking a special business, cannot, on the subject of that trust, act for his own benefit to the injury of his

- principal. *Parket v. Alexander and others*, 394
2. If an agent undertakes to judge whether he may not innocently depart from the instructions of his principal, he does it at his peril, *ib.*

AGREEMENT.

I. Consideration.

II. Specific Performance.

I. Consideration.

1. In regard to chattel interests, an agreement under seal imports a consideration at law. *Bunn and others v. Winthrop and others*, 329
2. And a voluntary bond, or deed, of a chattel interest, will be supported in equity without consideration, *ib.*
3. A *cestuy que trust*, though a mere volunteer, and the limitation without consideration, is entitled to the aid of this court; but the rule is otherwise where the party seeks to raise an interest by way of trust, on a covenant or executory agreement, *ib.*
4. Provision for the mother of a bastard, and for her infant, is a sufficient consideration to support a bond, or a deed of personal chattels, made by the father of the child for that purpose, *ib.*

Vide FAILURE OF CONSIDERATION. FRAUDULENT CONVEYANCES, 1, 2, 3, 4, 5, 6.

II. Specific performance.

5. Where a bill, filed to compel a performance of a parol contract, to compensate the plaintiff for the use of his land, could not be

- sustained, the contract not being valid by the statute of frauds; yet this court retained the bill, and awarded an issue of *quantum damnicatus*, to assess the damages sustained by the plaintiff by the acts of the defendants, as the plaintiff had sustained an injury for which he ought to be compensated, and for which he had no remedy, or, at best, a doubtful and inadequate one, at law. *Phillips v. Thompson and others*, 132
6. So, where possession had been taken of land, and improvements made under an agreement void by the statute of frauds, for a conveyance or lease, although an execution of the agreement will not be decreed on the ground of part performance, yet the bill will be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements. *Parkhurst and others v. Van Cortlandt*, 274
7. A court of equity will never decree performance where the remedy is not mutual, or one party only is bound by the agreement. S. C. 282
- S. P. *Benedict v. Lynch*, 370
8. Where A. contracted to convey to B., "by a good and valid conveyance in law," a farm, which was originally parcel of a large tract of ground granted by the proprietor of a manor to the ancestor of A., in fee, "yielding and paying to the grantor, his heirs and assigns, the yearly rent of ten shillings;" the proportion of which quit-rent, on the farm, was 54 cents a year; the existence of the quit-rent being known to B. at the time of the contract, it was held that the existence of such an encumbrance, if it were any, was no objection to a decree of specific performance of the contract. *Ten Broeck v. Livingston*, 357 *ib.*
9. Whether such a quit-rent, not having been demanded, or paid, for above 60 years, will not be presumed to have become extinguished by lapse of time. *Quere*, 10. In the sale of lands, time may make part of the essence of the contract; and on default at the day, without any just excuse, or any acquiescence, or subsequent waiver by the other party, the court will not help the party in default. *Benedict v. Lynch*, 370
11. Where A., in March, 1810, agreed to purchase a farm of B., and to pay 250 dollars in one year; one third of the residue of the purchase money in one year thereafter; and the other two thirds in the two successive years; and, on the payments being made, B. was to give a deed; and, if he failed in the payments, or either of them, the agreement was to be void; and A. entered into possession under the agreement, and made improvements, but made no payments; and B., in October, 1813, above two years after the first default, supposing the agreement void, or abandoned, sold the farm to a third person; a bill filed by A., in 1814, on a tender of the whole purchase money, for a specific performance of the agreement, was dismissed, with costs, ib.

*Vide DECREE, I. EVIDENCE, II. 14.
FRAUDULENT CONVEYANCES, 8.
JURISDICTION, 10.*

ALIEN.

1. An alien enemy may take personal property by succession, as next

- of kin, and is entitled to a distributive share, under the act for the distribution of intestate estates ; though he cannot recover it during a war ; but it remains in the hands of the administrator, in trust for him, until the return of peace. *Bradwell and others v. Weeks*, 206
2. An alien enemy does not forfeit his right of property. S. C. 208
 3. An alien enemy, who is permitted to remain in the country, or who is brought here as a prisoner of war, may sue for his rights, *ib.*

ALIMONY.

Vide DIVORCE, 1, 2, 3. 5, 6.

AMENDMENT.

1. Where a bill on demurrer is dismissed for want of equity, on the merits of the case, as stated, leave to amend the bill will not be granted. *Lyon and Brockway v. Talmadge and others*, 184
2. Amendments are granted only where there is some defect as to parties, or some omission, or mistake, of a fact or circumstance, connected with the substance of the case, but not forming the substance itself, or where there is some defect in the prayer for relief, *ib.*
3. The 11th rule of June, 1806, allowing the plaintiff to amend his bill of course, at any time before answer, plea, or demurrer filed, does not apply to the case of a bill sworn to by the plaintiff, as an injunction bill. *Parker and Bliss v. Grant and others*, 434

ANSWER.

Vide EVIDENCE, I. 1. *PLEADING*, III.

APPEAL.

1. An appeal, in the first instance, stays all proceedings in this court on the matter appealed from ; and if the defendant wishes to proceed, notwithstanding the appeal, he must apply to the chancellor for leave ; and unless the court of errors be at the time actually in session, and have the cause before them, this court must exercise its discretion as to the propriety of allowing the defendant to proceed. *Green and others v. Winter*, 77
2. Where an account was ordered to be taken before a master, on the principles laid down in the decree, this court refused to allow the account to be taken pending the appeal from that decree ; nor would it direct the appellant to deliver over deeds, &c. relative to his trust, *ib.*
3. On appeal from this court, the decree or order of the court of errors becomes, to this court, the law of the case ; and the party can have no other or further relief than what is administered by the decree of the court above. *Gelston v. Codwice and others*, 189
4. A court of review gives such decree as the court below ought to have given ; and when the plaintiff below brings the appeal, the court above not only reverses what is wrong, but decrees what is right, and models the relief according to its own view of the ends of justice, and the exigencies of the case. S. C. 194
5. The 37th rule of this court, made June 7th, 1806, requiring the party appealing from a decree or order of this court, to deposit 100 dollars with the register or assistant register, to answer for costs, &c. is an equitable and salutary

- rule, intended to prevent delay and abuse. *Bradwell v. Weeks*, 325
6. The practice on an appeal is to lodge the appeal in the register's office ; and the court above is not possessed of the jurisdiction of the cause, until the petition of appeal has been presented to them, which cannot be until they are in session. S. C. 326
- APPEARANCE.**
- Vide PRACTICE, II.*
- ARBITRATION.**
- Vide AWARD.*
- ASSETS.**
- Vide EXECUTOR AND ADMINISTRATOR, I.*
- ASSIGNMENT.**
- Vide EVIDENCE, II. 2.*
- ATTORNEY AND CLIENT.**
- Vide FRAUD, 1.*
- AWARD.**
1. Arbitrators, after a witness had been sworn and examined, and they were left alone to deliberate on their award, called the witness again, and without the knowledge or presence of the parties, examined him as "to matters material to the controversy, on which he had before given testimony, but about which the arbitrators differed as to what the witness did testify on the former hearing." An injunction to stay a suit at law, on the arbitration bond, for the performance of the award, was refused. *Herrick v. Blair and Blair*, 101
 2. Awards cannot be impeached, or set aside, unless for corruption, partiality, or gross misbehaviour in the arbitrators, or for some palpable mistake of the law or the fact, *ib.*
 3. Where a cause is referred by consent of parties, under an order of court, and the referees, who were two lawyers and a merchant, were to decide all questions in dispute between the parties, as well matters of law as of fact ; and a question of law, as to a will, put in issue by the pleadings, and discussed before the referees, was decided by them ; it seems this court will not interfere with the award, unless a gross and palpable mistake is shown. *Roosevelt and others v. Thurman*, 221
 4. This court will not grant an injunction to stay an action at law on an award, on the ground that the plaintiff was surprised by the principal witness, for the defendants, swearing falsely before the arbitrators ; and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time of making the award. *Woodworth v. Van Buskirk and Slocum*, 432
- B**
- BARON AND FEME.**
1. A husband is accountable for the personal estate of his wife, secured to her separate use by a deed of marriage settlement, and

which has come into his hands during the coverture; but not for interest on moneys he may have received for debts due to her. *Methodist Episcopal Church v. Jaques and others,* 450

2. The husband is also accountable for the rents and profits of the wife's real estate, received by him; and lands purchased by him, with the moneys of the wife, are deemed to be held in trust for her, though purchased in his own name; and a third person, to whom the husband had conveyed an estate so purchased, with notice of the manner of his acquiring it, was held to be chargeable with the trust; but the trustee is to be allowed for any beneficial and permanent improvements made by him on the estate, *ib.*
3. Where, by a marriage settlement, the whole real and personal estate of the wife is secured to her separate use, the husband is, notwithstanding, bound to maintain his wife and family during the coverture, and cannot make the expenses a charge on her separate estate; and the consent, or agreement, of the wife, during coverture, that the expenses should be borne by her separate estate, is null and void, *ib.*
4. But the husband is entitled to an allowance for moneys expended in necessary reparations of the wife's separate estate, and for any specific appropriation of her property, with her assent or direction, for her benefit, (not bearing for the ordinary maintenance of her or his family,) *ib.*

Delivery of a deed of marriage settlement, vide DEED, II. 18.

Vide ADULTERY. DIVORCE. DOWER.

MARRIAGE. NB EXEAT, 4. SETTLEMENT, 1.

BIGAMY.

Vide MARRIAGE.

BILL OF DISCOVERY.

Vide DISCOVERY.

BILL OF REVIEW.

Vide DECREE, 3.

BOND.

Vide JURISDICTION, 7, 8, 9.

C

CANCELLING INSTRUMENTS.

Vide JURISDICTION, 7, 8, 9.

COLLATERAL SECURITIES.

Vide DEBTOR AND CREDITOR, 4.

COMMISSIONS.

1. The plaintiff and defendant were joint owners of a ship and cargo, on a voyage from New-York to Batavia, and back; and the defendant agreed to go out in the ship as *supercargo*, and the plaintiff agreed to pay him, as a compensation for the performance of the duties of a supercargo, the sum of 10,000 dollars, "out of the proceeds of any cargo the ship may bring from Batavia, or to deliver him part of such cargo, to that amount, at the current market price, on its arrival at New-York, at his option." The ship, on her return voyage, from

- necessity, put into *St. Kitts*, where she was condemned as unseaworthy, and sold with the cargo, and the proceeds remitted, by the supercargo, to *New-York*. The defendant having caused 8,000 dollars of the sum stipulated to be paid to him by the agreement to be insured, as his *commissions*, he recovered the amount in a suit at law, of the underwriters, as for a total loss, on the ground that he had no remedy on the agreement against the plaintiff, his compensation being payable only out of a particular fund, which depended on a contingency that had never happened. On a bill filed against the defendant for an account, the defendant claimed to retain a certain sum for commissions and for services, in the sale and management of the concern; and it was held that the defendant was not entitled to any allowance, on a *quantum meruit*, for his services merely on the ground that the contingency had never happened on which his specific compensation for the same service was to depend; nor was he entitled to any compensation for his services at *St. Kitts*, as he still acted in the character of supercargo, and the sales there were substituted for a sale in *New-York*, on which, by his special agreement, he was to receive no commission. *Franklin and others v. Robinson*, 157
2. Joint owners, or partners, are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose. *ib.*

COMPOUND INTEREST.

Vide INTEREST.

CONSIDERATION.

Vide AGREEMENT, I.

CONTRACT.

Vide AGREEMENT.

CONTRIBUTION.

1. Where a bond, payable in two instalments, was secured by a mortgage on a mill, &c., and the debtor afterwards gave a second mortgage on six other lots of land specifically, to secure the payment of the first instalment, but without reference to the first mortgage; and all the parties, afterwards, by an arrangement between them, declared the second instalment paid, and cancelled the first mortgage, leaving the second mortgage to remain as security for the first instalment; and at a sale of the six lots, under a subsequent judgment, which was a lien on the equity of redemption in these lots only, A. purchased two lots, and B. four lots, knowing, at the time, the situation of the mortgage; and B., afterwards, purchased the second mortgage, and filed a bill to foreclose; it was held that A. was bound to contribute towards the satisfaction of the principal and interest due on the first instalment, according to the actual relative value of the lots, and not according to the prices for which they were sold at the sheriff's sale. *Cheesebrough and others v. Millard and others*, 409

Vide SUBSTITUTION.

2. Where six separate lots, or parcels of land, were mortgaged,

- and the mortgagee, afterwards, released four of the lots from the mortgage, leaving the original debt to stand charged on the remaining two; it was held that the two lots were chargeable with their rateable proportion only of the original debt and interest, according to the relative value of the six lots at the date of the mortgage. *Stevens and others v. Cooper and others,* 425
3. Where land is charged with a burden, each part ought to bear no more than its due proportion of the charge; and equity will compel each part to a just contribution, *ib.*
4. And a creditor cannot, by any assignment or act of his, deprive the co-debtors, or owners of the land, of their right of contribution against each other, *ib.*
- S. P. *Cheesebrough and others v. Millard and others,* 409
5. The court will compel the creditor to aid the contribution, by assigning his bonds and securities to the debtor, or surety, or owner of the land, whom he charges with his whole demand; and they will not permit him voluntarily to defeat this right. *Stevens and others v. Cooper and others,* 430
6. A purchaser of part of lands mortgaged, from the mortagor, is not bound to contribute rateably with a purchaser of the equity of redemption, under a judgment subsequently obtained, towards the discharge of the mortgage; unless the residue of the mortgaged premises proves insufficient to extinguish the debt. *Gill v. Lyon and others,* 447

CORPORATION.

Vide PLEADING, I. 5, 6.

COSTS.

- I. *Costs in general.*
 - II. *Taxation.*
 - III. *Security for costs.*
- I. *Costs in general.*
1. Costs are in the discretion of the court. *Methodist Epis. Church and others v. Jaques and others,* 77
 2. P. *Nicoll v. Trustees of Huntington,* 166
 2. Costs decreed against a trustee who had been guilty of negligence. *Gray v. Thompson,* 82
 3. If a final decree is silent as to costs, they are lost, and cannot, afterwards, be ordered to be paid, unless on a rehearing the decree has been opened for that purpose. *Travis and others v. Waters,* 85
 4. If a party dies before the costs are decreed, they are lost; the general rule being, that the costs die with the person; but if costs have been decreed, and the party dies before they are *taxed*, they may be recovered by his personal representatives on a bill of revivor; but, to obtain the costs, the executors, or personal representatives, must be before the court expressly in their character as such; for if the bill of revivor states the plaintiffs to be the heirs and devisees of the party deceased, though some of them, in fact, are executors, yet they can only be known in their former characters, and not as executors, *ib.*
 5. On a bill by a legatee against the administrator, where the defendant submitted to, and asked, the direction of the court, his costs were ordered to be paid out of

- the fund. *Moore and others v. Dickey,* 153
6. Costs in equity do not always follow the event of the cause; but are awarded, or not, according to the justice of the case, in the sound discretion of the court. *Nicoll v. Trustees of Huntington,* 166
7. And where a plaintiff had probable cause for seeking the aid of the court, but failed in establishing his title; but the defendant showed none, or no better title to the property in dispute, the bill was dismissed without costs on either side, *ib.*
8. An administrator, or trustee, who resists a claim, and litigates, *bona fide*, from a conviction of duty, and where no intentional default is made to appear, will not, under the circumstances of the case, be charged personally with the costs; but they must be paid out of the assets of the intestate. *Mores and others v. Muggatreyd,* 473
9. A purchaser of land chargeable with constructive notice only, by means of a *lis pendens*, is not to be charged with costs, there being no actual fraud, though the purchase is set aside on the ground of the implied fraud. *Murray & Winter v. Ballou & Hunt,* 566
- Vide Dowager, I. Executor AND ADMINISTRATOR, III. SOLICITOR.*
- H. Litigation.*
10. It is too late, after two terms have intervened, and the decree is signed, to move for a taxation of costs. *Mercer and another v. Millott and others,* 44
11. The cost on exceptions, like costs in all other cases in chan-
- cery, are subject to the discretion of the court. *Methodist Episcopal Church and others v. Jaques and others,* 66
12. But the general rule is, that if the defendant submits to the exception, the plaintiff has his costs; and if they be referred to a master, the plaintiff shall have costs on the exceptions allowed, and the defendant his costs on the exceptions disallowed, and the balance struck is to be paid, *ib.*
- III. Security for costs.
13. Though the 54th rule of the court, (June, 1806,) where a non-resident files a bill, requires that security for costs should be filed, and if the solicitor for the plaintiff proceeds without filing security, he is liable for costs to the amount of one hundred dollars; yet the court, if application for that purpose is made in due season, that is, before the answer is put in, or the first opportunity after the defendant knows of the fact of the non-residence of the plaintiff, will order proceedings to be stayed, until adequate security for costs, that is, to a greater sum than 100 dollars, is filed by the plaintiff. In this case, the court ordered a bond, with surety, to be executed to the defendant, for 750 dollars, and filed with the register. *Long v. Maguire & Tardy,* 202
14. The 12th sect. of the act concerning divorces, (sess. 36. c. 102. 2 N. B. L. 187.) relating to security for costs to be given by the plaintiff, does not apply where the bill is filed on the ground of adultery, though the bill contains, also, a distinct charge of cruel and inhuman treatment. *Pomeroy v. Pomeroy,* 606

Security for costs on appeal, *vide*
APPEAL, 5. PRACTICE, II.

COURT OF ERRORS.

Vide APPEAL.

CROSS BILL.

Vide PLEADING, II. 13. PRACTICE,
VII. 27.

D

DEBTOR AND CREDITOR.

1. A creditor is not allowed to make it a *condition* of a loan, that he shall receive a *compensation for his services* in procuring the money; as the allowing such a demand has a tendency to usury and oppression. *Hine v. Handy*, 6
2. And if the amount of such compensation is included in the security given for the loan, the court will, on the debtor's paying into court the amount reported to be due by a master, after deducting the sum charged for such services, grant an injunction (on payment of costs by the plaintiff) to stay any proceedings on the mortgage, *ib.*
3. The actual expenses of the writings, or securities, are to be paid by the borrower. S. C. 7
4. Collateral securities to creditors, are considered as trusts for the better protection of their debts; and equity will see that their intention be fulfilled. *Moses and others v. Murgatroyd and others*, 119
5. A creditor filing a bill against an *executor*, cannot make a debtor of the estate a party, except

where the executor is insolvent, or there is collusion between the executor and debtor, or in some other special case. *Long v. Majestre & Tardy*, 305

6. As where A. and B. carried on trade, as partners, with the funds of A., in the name of B., and without any dissolution of the partnership, or rendering any account to A., B., afterwards, without the consent of A., entered into a partnership with C., and carried into the new concern all the funds of the former partnership; and A., on the death of B., filed a bill against his administratrix, and C., his surviving partner, for a discovery and account; and C. demurred to so much of the bill as sought an account from him of the transactions and profits of the partnership between him and the intestate, and of the personal estate of the intestate in his hands: the demurrer was overruled, *ib.*

Contribution between co-debtors, &c.
vide CONTRIBUTION.

Assets, legal and equitable, *vide* EXECUTOR AND ADMINISTRATOR, I.

Vide MORTGAGE.

DECREE.

1. A decree on a bill for a specific performance, on the coming in of the master's report, as to the quantity of land to be conveyed, and the payments made, directing the balance due to be paid, and the conveyance to be executed, is a final decree. *Travis and others v. Waters*, 85
2. If a final decree is silent as to costs, they are lost, and cannot, afterwards, be ordered to be paid,

- unless, on a rehearing, the decree has been opened for that purpose. *Travis and others v. Waters*, 85
3. A decree can never be impeached by an original bill; it can only be questioned by a bill of review. *Gelston v. Codhoise*, 195
 4. A regular decree on the merits cannot be set aside on motion; and it seems, that where it is sought to set aside a decree on the ground of surprise and irregularity, the course is to apply by petition. *Radley and others v. Shaver and others*, 200
- Appeal from decree, vide APPEAL.**
- Decree by default, vide PRACTICE, I.**
- DECREE OF THE COURT OF ERRORS.**
- Vide APPEAL*, 3, 4.
- DEED.**
- I. Construction, validity, and operation.**
- II. Execution and delivery.**
- I. Construction, validity, and operation.**
1. It is a general principle in the construction of written instruments, that a particular specification will exclude things not specified. *Nicoll v. Trustees of Huntington*, 183
 2. Declarations of the intention or understanding of a grantor, different from the intent apparent on the face of a deed, or of conditions annexed to it, to be effectual, must be made at the time of executing it. *Souverbye and wife v. Arden and others*, 240
 3. A mistake in drawing a deed must be clearly proved, *ib.*
4. As between the parties, a voluntary actual transfer, by deed, of a chattel interest, is valid, without any consideration appearing. *Bunn and others v. Winthrop and others*, 329
 5. Plate used in the family passes under a devise or conveyance of "household goods and furniture," *ib.*
 6. A deed, false in a material point, is not entitled to full credit. *Wendell v. Van Rensselaer*, 352
 7. Where a deed, in fee, contained a reservation of the right of "cutting and hewing timber, and grazing in the woods, not appropriated or fenced in;" it was held that the right reserved ceased as soon as the premises were fenced in by the grantee, especially where it appeared that the premises had been enclosed for above 30 years, and the right, during that period, had not been claimed or exercised. *Ten Broeck v. Livingston*, 357
 8. Such rights may be lost by long negligence and disuse; and presumptions of their release, or discharge, are favoured for the sake of quieting possessions, *ib.*
 9. Where a deed has been duly executed and delivered, a subsequent surrender or destruction of it will not divest the estate conveyed by it. *Nicholson v. Halsey and others*, 417
- Vide EVIDENCE*, II. 9, 10, 11.
- II. Execution and delivery.**
10. If, at the time of executing a deed, there was no delivery, or intention to deliver, these are facts which should be explicitly proved by the grantor. *Souverbye and wife v. Arden and others*, 240

INDEX.

11. If a deed has been duly delivered in the first instance, the subsequent custody of it by the grantor, will not destroy the effect of the delivery. *Bouveryste and wife v. Arden and others*, 240
12. A deed may be delivered to a third person, as the servant, or bailee of the grantee, and such delivery will be valid, ib.
13. A voluntary settlement, fairly made, is always binding, in equity, upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed: and, if he retain it, there must be other circumstances beside the mere fact of his retaining it, to show that it was not intended to be absolute, ib.
14. If a deed be duly executed in the first instance so as to take effect, any subsequent delivery is null and void. S. C. 258
15. Where a deed was deposited by the grantor with W., as an escrow, to be delivered to the grantee on his producing a mortgage executed and recorded, and a certificate of the clerk of no encumbrances on record, and W., on receiving the mortgage and certificate of registry, &c. delivered the deed to the grantee, and the grantor received the mortgage, &c. from W., and treated it afterwards as a valid mortgage; he was held to be concluded from denying the delivery of the deed, on the ground that the wife of the mortgagor had not acknowledged the mortgage, and that the mortgage was erroneously registered for less than the true sum. *Frost and others v. Beekman*, 288
16. A deed, delivered as an escrow, takes effect only from the time of the performance of the con-
- dition, and the actual delivery to the grantee: except in cases where a relation back to the first delivery is necessary to give effect to the deed, or to the intermediate conveyances of the grantee; but not as between third persons. *Frost and others v. Beekman*, 288
17. A voluntary conveyance, or settlement, though retained by the grantor, in his possession, until his death, is good. *Burn and others v. Windthrop and others*, 329
18. Where a deed of marriage settlement was executed in the presence of witnesses, and laid on the table, and the marriage took place immediately thereafter, in the presence of all the parties; and the deed, without any other or more formal delivery, was taken by the wife, the *testus que trust*, and kept in her possession until her death; this was held, under the circumstances, to be a good and valid deed. *Methodist Episcopal Church v. Jaques and others*, 450

DEFAULT.

Vide PRACTICE, I.

DEFEASANCE.

Vide MORTGAGE, I. 3.

DEMURRER.

Vide PLEADING, IV.

DEPOSITIONS.

Vide EVIDENCE, III.

DESCENT.

1. Where the legal and equitable estates in land, being co-extensive,

- unite in the same person, the equitable is merged in the legal estate, which descends according to the rules of law. *Nicholson v. Halsey and others,* 417
2. Thus, if the legal estate in fee descend, *ex parte materna*, and the equitable estate in fee, *ex parte paterna*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate, *ib.*
3. As where A., having paid money for the purchase of land, died before any conveyance was made, and B., afterwards, took a conveyance of the land, in trust, for the infant daughter of A., to whom he, afterwards, executed a deed in fee; she was held to have acquired the legal estate by purchase; and on her death, without issue, the estate descended to her brothers and sisters of the half blood, to the exclusion of her paternal uncle, *ib.*
- the houses, to have no claim to the 1,000 pounds, before left him, but his share to be equally divided with the other legatees. R. arrived at the age of 21 years, but had no issue.
- It was held that, by the words "dying without male issue," R. took an estate tail, by the English law, or an estate in fee under our statute; that the fee vested in R., on his attaining the age of 21 years, or having male issue, either event being sufficient for that purpose. *Roosevelt and others v. Thurman,* 220
2. That the clause, that the first taker was not to dispose of the estate before his eldest son came of age, did not engraft an executory devise on the preceding fee, but was intended by the testator as a temporary restriction on the power of alienation, and being repugnant to the nature of the estate, was void, *ib.*

DEVISE.

1. T., by his last will, after giving to his nephews, R., N., S., &c., each 1,000 pounds, as they came of age, devised two houses and lots, "with every right agreeable to the deeds of the same," to R., to be delivered to him as soon as he came to the age of 21 years; and if he died "before he came to age, and without male issue," he devised the same to N., "to be delivered to him as soon as he comes to the age of 21 years." "The first possessor, (R.) as soon as his first male child shall come to the age of 21 years, it is my will that the right of the said houses be to him, his heirs and assigns, for ever; but not to be disposed of before his eldest son comes to age;" whoever gets

- DISCOVERY.
1. If a bill seeks discovery in aid of the jurisdiction of a court of law, it must appear that such aid is clearly necessary, and the discovery material to the defence; for where the facts depend on the testimony of witnesses, and the court of law can compel their attendance, this court will not interfere. *Gelston and Schenck v. Hoyt,* 543
2. It seems that this court will not sustain a bill of discovery, and an injunction, merely to procure such admissions by the party as might be used in mitigation of damages, in an action of trespass, at law, unless, perhaps, in very special cases, *ib.*

Vide INJUNCTION, II. 7. 12. 14. 15.

NEW TRIAL, 4. PLEADING, III.
14, 15, 16.

DISTRIBUTION.

Vide ALIEN.

DIVORCE.

1. Pending a bill by a wife for a divorce, to which the defendant had demurred, and before a hearing on the demurrer, on the petition of the plaintiff, setting forth that she was abandoned by the defendant, and wholly destitute of all means of support, and for carrying on the suit, the court, under the circumstances of the case, ordered an allowance of *thirty dollars* a month, to be paid by the defendant to the plaintiff, monthly, or to the register, for her use, until the further order of the court. *Miz v. Miz*, 108
 2. Where a wife had filed a bill for *alimony*, &c. against her husband, and it appeared that he had abandoned her without any support, and threatened to leave the state, the court, on the petition of the wife, granted a writ of *ne ezeat republica* against the husband. *Denton v. Denton*, 364
 3. Pending a bill for a divorce by a wife against her husband, and before answer, the court will allow a monthly sum to the wife, as *alimony*, and also a sum to be paid to her, by her husband, towards defraying the expenses of her suit, ib.
 4. A divorce will not be decreed on the consent of parties. *Williamson v. Williamson*, 488
 5. On a bill by the wife against the husband, for a divorce from bed and board, on the ground of cruel usage, and for maintenance, the court, under the circumstances of the case, having a due regard to the age and expectations of the parties, decreed a divorce for five years; that the plaintiff, in the mean time, should have the custody and care of the child, a daughter; and that the defendant should pay 100 dollars a year, in half yearly payments, one half to be applied to the maintenance of the plaintiff, and the other half to the maintenance and education of the child, it appearing from the master's report that the defendant was worth about 3,500 dollars, the annual income of which was about 100 dollars; and the defendant was directed to pay the costs of the suit. *Bedell v. Bedell*, 604
 6. Licentious conduct and misbehaviour of the wife, if existing before the alleged acts of cruel treatment by the husband, will destroy her claim for maintenance, ib.
 7. The 12th section of the act concerning divorces, (sess. 36. c. 102. 2 R. L. 197.) relative to security for costs to be given by the plaintiff, does not apply where the bill is filed on the ground of *adultery*, though the bill contains also a distinct charge of cruel and inhuman treatment. *Pomeroy v. Pomeroy*, 606
 8. It seems, that the charges of adultery and cruel treatment, cannot both be contained in the same bill, ib.
- Divorce a vinculo matrimonii*, *vide ADULTERY.*
- DOWER.**
1. Where, on a bill of foreclosure, the widow of the mortgagor was made a party, and answered, and submitted to the decree of the

- court, she was held entitled to the use of one third of the surplus proceeds of the sale of the mortgaged premises, remaining in court after satisfying the mortgage debt, as her equitable dower: and to her costs, to be paid out of the other two thirds. *Tabele v. Tabele and others,* 45
 2. Widow of mortgagor is, at law, entitled to dower, subject to the mortgage, *ib.*

DROWNED LANDS IN ORANGE COUNTY.

The commissioners under the act *relative to draining the drowned lands in Orange county*, (sess. 30. c. 25.) had no right to use the lands of a party, or to remove or destroy his property, without a valid and legal contract with him for that purpose, or until compensation had been made and tendered to him according to the act. *Phillips v. Thompson*, 132

E

EQUITY OF REDEMPTION.

Vide MORTGAGE, III.

ESCROW.

Vide DEED, II. 15, 16.

ESTATE.

Legal and equitable, *vide DESCENT*.

Fee simple and tail, *vide DEVISE*, 1.

EVIDENCE.

I. Written evidence.

II. Parole evidence to explain, vary, or contradict written instruments.

III. Parol evidence, witnesses, and examination.

I. Written evidence.

1. A plaintiff cannot read his own answer to a bill of discovery in a cross suit in evidence, unless the defendant chooses first to produce it. *Phillips v. Thompson and others*, 131

Testimony requisite to repel denial in answer, *vide post*, III. 18, 19, 20.

Conclusiveness of judgment or decree, *vide RES JUDICATA*.

II. Parole evidence to explain, vary, or contradict written instruments.

2. Where an assignment is, on the face of it, *general*, yet, if it be admitted to be different in its purpose, or for a specific security, *parol* evidence is admissible to show the real intent of the parties. *Moses and others v. Murgatroyd and others*, 119

3. Parol evidence is inadmissible to supply or contradict, enlarge or vary, the words of a will, or to explain the intention of the testator, except there is a latent ambiguity arising dehors the will, as to the person or subject meant to be described; or to rebut a resulting trust. *Mann and others v. The Executors of Mann*, 291

4. Declarations of the intention or understanding of a grantor, different from the intent apparent on the face of a deed, or of conditions annexed to it, to be effectual, must be made at the time of

- executing it. *Souerby and wife v. Arden and others*, 240
5. If, at the time of executing a deed, there was no delivery, or intention to deliver, these are facts which should be explicitly proved by the grantor, *ib.*
 6. So, a mistake in drawing a deed must be clearly proved, *ib.*
 7. Where an agreement is reduced to writing, all previous negotiations, resting in *parol*, are extinguished by the written contract, and cannot be resorted to to help out or explain its meaning. *Parkhurst and others v. Van Cortlandt*, 273
 8. A contract cannot rest partly in writing, and partly in *parol*; and where a *part performance* is set up to take the case out of the statute of frauds, the party is not allowed to resort to *parol* evidence in aid of the written agreement, *ib.*
 9. *Parol* evidence is inadmissible to support an agreement set up in contradiction to a deed. *Movan v. Hays*, 339
 10. Where no trust appears on the face of a deed, nor any manifestation or evidence of it by writing, *parol* evidence is inadmissible to show the trust, *ib.*
 11. If a deed, after mentioning a specific consideration, adds, "and for other considerations," it seems, that *parol* evidence is admissible to show what were those other considerations. *Benedict v. Lynch*, 30
 12. Where several lots of land are mortgaged, the mortgagor, or purchaser under him, cannot set up a *parol* agreement, made at the time of the mortgage, that in case the mortgagor sold either of the lots, the mortgagee would release the lot so purchased from the mortgage, on being paid a certain sum, per acre, by the purchaser. *Stevens and others v. Cooper and others*, 425
 13. The rule that *parol* evidence is inadmissible to contradict, or substantially vary, the legal import of a written agreement, is the same in courts of law and of equity. *S. C.* 429
 14. Evidence that an agreement in writing, concerning lands, has been discharged by *parol*, is good as a defence to a bill for a specific performance, but is totally inadmissible at law or equity, as a ground to compel a performance *in specie*, *ib.*
 15. *Parol* evidence is admissible to show that an absolute deed was intended as a mortgage, or that the defasance had been destroyed by fraud or mistake. *Marks and others v. Pell*, 594
 16. But where a bill was filed for an account and for a reconveyance, 30 years after the deed, alleged to be a mortgage, was given, during all which time the defendant had been in possession, *parol* evidence of the mere confessions of the defendant, made 17 years after the deed, that it was taken as security for a debt, was held insufficient, *ib.*
- Resulting trust, *vide FRAUDS, (STATUTE OF,) 10, 11, 12.*
- ### III. *Parol evidence, witnesses, and examination.*
17. Declarations of a person, not a party in interest, nor a party to the suit, and who is a witness in the cause, are not competent evidence. *Phillips v. Thompson and others*, 131
 18. Where the facts charged in a bill are fully denied by the answer, there can be no decree against

- the answer, on the evidence of a single witness only, without corroborating circumstances to supply the place of a second witness. *Smith v. Brush and others*, 459
19. And where publication had passed in a cause, without any witnesses being examined on either side, the court refused, especially after the lapse of more than two years from the time of filing the bill, to open the rule for publication, on the affidavit of the plaintiff of the discovery of a witness who would prove a material fact in the cause, denied in the answer, *ib.*
20. Nor would the court, under the circumstances, award a feigned issue in the cause, that being a measure of sound discretion, *ib.*
21. After publication passed, and the cause set down for hearing, the deposition of a witness was allowed to be amended, on examination of the witness by the court, he being aged and very deaf, and a mistake made in taking down his testimony by the examiner. *Denton and others v. Jackson and others*, 526
22. Where, on a cause coming on to a hearing, it appears that a witness has misbehaved in his answers to the interrogatories, the depositions may be suppressed. *Phillips v. Thompson*, 140
23. Or, if a further answer to the interrogatories be deemed material, the court may order a further examination of the witness, on the interrogatories, before a master, or in open court, *ib.*
24. Where, at the hearing of a cause, and after the argument had been finished in part, an objection was made to the competency of a witness, whose deposition, taken before an examiner, had been read, the court allowed the plain-
- tiff to prove the execution of a release by the witness of all his interest, by the examination of a witness, *viva voce*, without any previous order or notice for that purpose. *Barrow and others v. Rhinelander*, 559
25. A witness may be examined, *viva voce*, at the hearing, for a particular purpose, as to prove exhibits which had not been proved before the examiner, *ib.*
26. But the regular way is to serve a previous order for that purpose, or notice, on the opposite party, four days before the hearing, *ib.*
27. A witness who has been examined before a commissioner, by consent of parties, on affidavit that his testimony was not truly taken down by the commissioner, who had mistaken it materially, was ordered to be re-examined before the examiner, there being no suggestion of any tampering with the witness. *Trustees of Kingston v. Tappen*, 368
- Admissibility of confessions on a bill for a divorce, *vide ADULTERY*, 1, 2.
- EXAMINATION.**
- Vide EVIDENCE*, III.
- EXCEPTIONS.**
- Costs on, *vide COSTS*, II. 11, 12.
- To answer, *vide PRACTICE*, III.
- To master's report, *vide PRACTICE*, V.
- EXECUTION.**
1. Where an execution has been paid, the sale can be stopped by a judge's order; and this court will not interfere. *Lansing v. Eddy*, 50

INDEX.

2. The fourth section of the statute of uses, (sess. 10. ch. 37. 1. R. L. 72.) rendering lands liable to execution against the *cestuy que use, or cestuy que trust*, applies only to those fraudulent and covenanted trusts, in which the *cestuy que trust* has the whole real beneficial interest in the land, and the trustee the mere naked and formal legal title. *Bogart v. Perry and others*, 52
3. Where a tract of land is divided into separate and distinct lots and parcels, it is the duty of the sheriff who has an execution against the land, to sell it in parcels, and not the whole tract together. *Woods v. Monell and others*, 502
4. But to set a sheriff's sale aside, there must be satisfactory evidence of fraud, or abuse of power in the sheriff, *ib.*
5. A sheriff ought not to sell more than is requisite to satisfy the execution; and if he sell a whole tract, when a small part of it would be sufficient, or probably sufficient for the purpose, it is a fraud that ought to set the sale aside. S. C. 505
- Priority and lien of executions, vide JUDGMENT, I.**
- EXECUTOR AND ADMINISTRATOR.**
- I. *Assets.*
- II. *Administration and payment of debts and legacies.*
- III. *Actions by and against; and costs in such actions.*
- I. *Assets.*
1. The administrator of a mortgagor is not, *as such*, entitled to the surplus money arising from the sale of the mortgaged premises; but it is considered as part of the real estate, and goes to the heirs, and will be assets in their hands. *Moses and others v. Murgatroyd and others*, 119
2. And where the heirs were before the court, by their parent, it was ordered to be distributed, as equitable assets, among all the creditors, *pari passu*, *ib.*
3. But as the creditor has a remedy at law against an equity of redemption, it is questionable whether, *before a sale* of the mortgaged premises, it could be deemed equitable assets, *ib.*
4. Assets may be partly legal, and partly equitable, and the court will discriminate in the distribution of them: following the rule of law, as to the legal assets, so as to prevent confusion in the administration of the estate; but directing the equitable assets to be applied ratably among all the creditors, without preference, *ib.*
5. On a rehearing, the court refused to alter the decree before given in the cause, except as to the payment of costs by the administrator. S. C. 473
6. And the court refused to order the costs of the administrator of the mortgagor, on the sale of premises mortgaged in fee, to be paid out of the proceeds in this court, *ib.*

Vide post, II. 11.

- H. *Administration and payment of debts and legacies.*
7. Payment of a legacy, or distributive share, to the guardian, *by nature*, of an infant, is at the peril of the executor or administrator, who may be compelled to

- pay the same over again. Otherwise, where the payment is to a guardian appointed by this court, who has given the requisite security. *Genet, guardian, &c. v. Tallmadge, administrator,* 3
8. Courts, in this state, do not take notice of letters testamentary, or letters of administration, granted abroad, or out of the state. *Morrell and others v. Dickey,* 153
9. Nor can a person appointed a *guardian* to an infant, in another state, be entitled to receive from the administrator, here, the legacy or portion of the infant, *ib.*
10. The guardian must be appointed here, and give competent security, to be approved of by this court, before the payment of the infant's money will be ordered, *ib.*
11. Where a testator directed his executors to sell his real estate, to pay debts and legacies, in case of a deficiency of the personal estate; and a bill filed by the executors of a legatee and creditor, prayed a sale of the real estate, the executors of the testator having admitted that the personal estate was insufficient, the court directed a master first to ascertain and report whether the executors had duly administered all the *assets*, before recourse could be had to the land, or determining whether the devisees in remainder were to be brought in. *Arden's executors v. Arden's executors,* 313
- tee, who resists a claim, and litigates, *bona fide*, from a conviction of duty, and where no intentional default is made to appear, will not, under the circumstances of the case, be charged, personally, with the costs; but they must be paid out of the assets of the intestate. *Moses and others v. Murgatroyd,* 473
13. The court refused to order the costs of the administrator of the mortgagor, on the sale of premises mortgaged in fee, to be paid out of the proceeds in this court, *ib.*
14. Though the general rule is, that executors must pay costs when they pay interest, because they are in default; yet, where the devisee, or *cestuy que trust*, demands more than he is entitled to receive, and the executor properly submits to the direction of the court, he will not be compelled to pay costs. *Dunscomb and others v. Dunscomb's executors,* 508
15. Executors keeping part of a fund for commissions, and litigating in favour of their claim, were decreed to pay costs. *Manning and others v. Manning's executors,* 536
16. On a bill by a legatee against the administrator, where the defendant submitted to, and asked, the direction of the court, his costs were ordered to be paid out of the fund. *Morrell and others v. Dickey,* 153

Vide TRUST AND TRUSTEE, II. 12. III. 20, 21, 22, 23, 24, 25, 26. IV. 29, 30, 31.

III. Actions by and against ; and costs in such actions.

12. Where an administrator, or trus-

Vide DEBTOR AND CREDITOR, 5, 6. Ante, I. 6. INTEREST, 4. PLEADING, I. 1. 7, 8.

EXECUTORY DEVISE.

Vide DEVISE, 2.

F

FAILURE OF CONSIDERATION.

Where A. conveyed land to B., by deed, with covenants of warranty, and B. executed to A. a bond and a mortgage, to secure the payment of part of the purchase money, B. cannot be relieved against the mortgage, on the ground of a failure of consideration, for want of title in A., possession having been taken by B., under the deed, and there being no eviction at law, under a paramount title; and, more especially, in a case where the bond and mortgage having been assigned to C., B., in consideration of forbearance, executed a new bond and mortgage to C., for the same premises, will relief be denied against the assignee for a valuable consideration, without notice of any fraud, or failure of consideration, in the creation of the original debt. *Bumpus v. Platner and others,* 213

FEIGNED ISSUE.

*Vide ADULTERY, 2. PRACTICE, VI.
22.*

FORECLOSURE.

Vide MORTGAGE, III.

FOREIGN LAWS.

1. Courts in this state do not take notice of letters testamentary, or letters of administration, granted abroad, or out of the state. *Morrell and others v. Dickey,* 158
2. Nor can a person, appointed a *guardian* to an infant in another state, be entitled to receive from

the administrator, here, the legacy or portion of the infant. *Morell and others v. Dickey,* 158

FRAUD.

1. A deed by a client to his attorney and scrivener, for the consideration of affection and friendship, and also for a sum of money, though not one third the value of the land conveyed, will not be set aside on the ground of ignorance and blind confidence on the one side, and undue influence on the other, there being no evidence of imbecility or incapacity in the grantor, nor of fraud or imposition by the grantee; nor of that relationship between the parties which might imply the existence of an undue influence. *Wendell v. Van Renesse-laer,* 344
2. Where a person having a conveyance of land, keeps it secret for several years, and knowingly suffers third persons, afterwards, to purchase parts of the same premises from the grantor, who remained in possession, and was the reputed owner, and to expend money on the land, without giving any notice of his claim, he will not be permitted, afterwards, to assert his legal title against such innocent and *bona fide* purchasers, *ib.*
3. Equity grants relief, not only against deeds, writings, and solemn assurances, but against judgments and decrees, obtained by fraud and imposition. *Reigal v. Wood and others,* 402
4. Where an attorney revived, by *scire facias*, an old outstanding judgment, on which but a very small sum, if any thing, was due, and knowing that the land on which the judgment remained a lien

was in the possession of innocent and *bona fide* purchasers; and afterwards made use of the judgment to compel the purchasers, who were ignorant of the proceedings under the *scire facias*, to pay and secure to him a debt he claimed against the person under whom they had purchased; this court, on the ground of imposition and undue advantage taken by the attorney, ordered him to refund the money he had so obtained, and set aside the securities he had taken, with costs. *Reigal v. Wood and others,* 402

5. Where a merchant, in embarrassed circumstances, borrowed money at different times of his confidential clerk, who took various bonds and securities for such loans, and for which, by agreement, he was to be allowed a usurious interest; and, during the period of ten years, the parties, from time to time, came to a settlement of their accounts, and the merchant gave his bonds and further securities for the balance of principal and interest, due on such settlements; the court ordered all the bonds, obligations, and settlements, to be set aside, and the accounts, at large, to be opened between the parties, from the first commencement of their transactions, there being not only evidence of mistake and omissions in the accounts, but of oppression, imposition, and undue advantage, taken of the necessities of the principal. *Barrow and others v. Rhinelander,* 550
6. The master, in stating the account between the parties, was directed to allow rests therein, at such times as the parties liquidated their accounts, and agreed that the interest, then due, should be considered as principal; and that

the clerk should be charged with the amount of all the securities, assigned to him, which had been paid, or which he had refused to deliver to his principal for collection, or which had been lost by his negligence, default, or want of due diligence in collecting them, with interest, &c. *Barrow and others v. Rhinelander,* 550

Vide Costs, I. 9. NOTICE.

FRAUDS, (STATUTE OF)

- I. *Memorandum in writing, of an agreement.*
- II. *Part performance and exceptions in the statute.*

I. *Memorandum in writing, of an agreement.*

1. A contract made by an owner of land with the commissioners, under the act relative to *draining the drowned lands in Orange county*, (sess. 30. c. 25.) by which they were allowed to use each bank of the river *Walkill*, &c. which they might find necessary, in removing all obstructions, and in deepening and widening the river, &c. and to use, occupy, and enjoy the same, and for which they were to pay a compensation to the owner for the damages, and who agreed to allow them to cut a canal through his lands, is a contract concerning an *interest in lands*, within the purview of the statute of frauds. *Phillips v. Thomson and others,* 131
2. A *memorandum in writing* of the sale of lands, to be valid within the statute of frauds, must not only be signed by the party to be charged, but must contain the es-

- essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof. *Parkhurst and others v. Van Cortlandt*, 273
3. Where an agreement is reduced to writing, all previous negotiations, resting in *parol*, are extinguished by the written contract, and cannot be resorted to to help out or explain its meaning, ib.
- II. Part performance and exceptions in the statute.**
4. To entitle a party to take a case out of the statute, on the ground of part performance of the contract, he must make out, by clear and satisfactory proof, the existence of the contract as laid in his bill. *Phillipe v. Thompson*, 132
- S. P. *Parkhurst and others v. Van Cortlandt*, 284
5. And the act of part performance must be of the identical contract set up by him, ib.
6. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill, ib.
7. A contract cannot rest partly in writing and partly in parol; and where a *part performance* is set up to take a case out of the statute, the party is not allowed to resort to parol evidence in aid of the written agreement. *Parkhurst and others v. Van Cortlandt*, 274
8. A part performance will not take a parol agreement out of the statute, unless the terms of the agreement distinctly appear, or are made out to the satisfaction of the court. *Parkhurst and others v. Van Cortlandt*, 274
9. But where possession has been taken of land, and improvements made, under such imperfect agreement, though the court will not grant relief on the ground of part performance, yet the bill will be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements, ib.
10. If A. purchase land with his own money, but the deed is taken in the name of B., a trust results, by operation of law, to A.; and the fact, whether the purchase was made with the money of A., on which the resulting trust is to arise, may be proved by parol, it not being within the statute of frauds. *Boyd v. M'Lean*, 582
11. And this parol evidence is admissible, not only against the face of the deed itself, but in opposition to the answer of the trustee, denying the trust; and that it seems, after the death of the nominal purchaser, ib.
12. Such evidence, however, is to be received with great caution, ib.
- Vide AGREEMENT, II. 5, 6.*
- FRAUDULENT CONVEYANCES.**
1. A voluntary conveyance, intended as a settlement for a child of the grantor, is void, as against a subsequent purchaser for a valuable consideration, with only implied notice of the previous deed, by the statute of frauds. *Sterry and wife v. Arden and others*, 261
2. But such deed may become valid by matter *ex post facto*, as by some valuable consideration intervening, ib.

3. Marriage is such a valuable consideration ; and, therefore, if the grantee in a voluntary deed gains credit by the conveyance, and a person is induced to marry her, on account of the provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary, and becomes good against a subsequent bona fide purchaser for a valuable consideration. *Sterry and wife v. Arden and others,* 261
4. And it makes no difference whether any particular marriage was in contemplation at the time of the voluntary settlement or not, *ib.*
5. A voluntary conveyance is void, as against the subsequent purchaser for a valuable consideration, with notice. S. C. 268
6. Where a deed is sought to be set aside, as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of the consideration, and fairness of the transaction, the court will not set aside the conveyance altogether, but will permit it to stand as security for the sum actually paid. *Boyd & Suydam v. Dunlap and others,* 478
7. And where the plaintiff was a purchaser at a sheriff's sale, under a judgment, the court gave the defendant his election to pay the amount of the judgment, interest, and costs, and take a conveyance from the plaintiff ; or, in default, to deliver up the deed to be cancelled, on receiving from the plaintiff the sum actually advanced by the defendant, *ib.*
8. There is difference between an interference actively to compel a party to reconvey or surrender a deed, and a refusal to aid a party who seeks a specific performance of a contract. If actual fraud be not proved, the court will not set aside the title ; but will either make it subservient to the equity of the case, or leave the party complaining to his remedy at law. S. C. 482
9. A court of law can only decide on the validity of the deed, and cannot modify its relief according to the equity of the case, *ib.*
10. A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity ; but it is otherwise with a deed obtained under suspicious or unequitable circumstances, or which is only constructively fraudulent, *ib.*

G

GUARDIAN.

1. A father, who has been appointed guardian to his infant children, by the court, and has given competent security to the executor or administrator under the act, (sess. 36. ch. 75. s. 18. 1 R. L. 314) and approved security to account to his children, on their coming of age, is entitled to receive legacies and distributive shares belonging to them. *Genet, guardian, &c. v. Tullmadge, administrator,* 3
- S. P. *Genet and others v. Tullmadge and others,* 561
2. But payment by an executor or administrator, to the father, as guardian by nature merely, is at the peril of the executor or administrator, who may, on the

- infant's attaining to full age, be compelled to pay the same over again. *Genet v. Tallmadge*, 3
Vide Morrell and others v. Dickey, 153
3. A guardian appointed by this court, during minority, continues until the infant arrives at 21, unless changed by order of the court, on good cause shown. An infant is not entitled, as of course, on arriving at the age of 14, to change the guardian appointed by this court. *In the matter of Nicoll*, 25
4. A surrogate has power to appoint a guardian, but has no jurisdiction over him as a trustee. *In the matter of Andrews*, 99
5. Chancery has the same superintendence and control over guardians by statute, or testamentary guardians, as it has over guardians in socage, *ib.*
6. Every guardian, however appointed, is responsible to this court for his conduct, and may be removed for misbehaviour, *ib.*
7. A guardian to an infant appointed in another state, is not entitled to receive from the administrator here, the legacy or portion of the infant. *Morrell and others v. Dickey*, 153
8. The guardian must be appointed here, and give competent security, to be approved of by this court, before the payment of the infant's money will be ordered, *ib.*
9. Where one of the sureties, before given by the guardian, had become insolvent, the court refused to order moneys belonging to the infants, and which had been paid into court by the administrator, to be paid over to the guardian, until other and further security had been given by him. *Genet and others v. Tallmadge and others*, 561
10. A guardian has no power or control over the real estate of his ward, further than concerns the rents and profits, *ib.*
11. Where certain commissioners, appointed to make partition of the real estate of an intestate, pursuant to an act of the legislature, sold parts of the estate, and paid the proceeds into this court, pursuant to an order for that purpose, and which had been invested in public stocks, by the assistant register, the court refused, on the petition of the guardian, to order the money paid over, or the stocks transferred to him, *ib.*
12. Where a bond given by a surety for the guardian of an infant, was taken by the surrogate in the name of the people, instead of the infant, the court corrected the mistake, and considered the bond as of equal validity as if taken in the name of the infant. *Wiser v. Blackly*, 607

H

HEARING.

Vide PRACTICE, VII. 27.

HUSBAND AND WIFE.

Vide BARON AND FEME.

I

IGNORANCE OF LAW.

Every man is to be charged with a knowledge of the law. *Shotwell v. Murray*, 516

INDEPENDENT STATE.

It belongs to the government of the country to declare, whether it will consider a colony that has thrown off the yoke of the mother country as an independent state; and, until government has decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged. *Gelston and Schenck v. Hoyt,* 543

IDIOTS AND LUNATICS.

1. The custody of a lunatic's person and estate, real and personal, may be committed to the next of kin, although heir at law. *Matter of Livingston,* 436
2. This court having the whole jurisdiction, in regard to idiots and lunatics, will direct the course of proceeding, on the traverse of the inquisition returned, in such a manner as may be most useful and expedient, so as best to inform its conscience, and afford the safest conclusion as to the existence of the fact of lunacy. *Matter of Wendell,* 600
3. The lunatic may be brought into court, after the inquisition is returned, and an inquiry be made, by inspection, or an issue may be awarded to ascertain, by a verdict at law, the existence or continuance of the lunacy, *ib.*
4. The most usual and proper course is, to have the issue made up and prepared for trial, under the direction of the court, instead of delivering over the record and traverse, after the attorney general has joined issue thereon, as practised in England, under the statute of 2 & 3 Edw. VI., which has not been re-enacted or adopted here, *ib.*

5. At the time of directing the issue at law, the court will, if necessary, make a provisional order for the care of the lunatic's estate, until the question of lunacy is determined. *Matter of Wendell,*, 600

IMPROVEMENTS.

Vide AGREEMENT, II. 6. BARON AND FEME, 2. FRAUDS, (STATUTE OF,) II. 9. MORTGAGE, IV. TRUST AND TRUSTEE, III. 14. 18.

INFANT.

Vide GUARDIAN. PRACTICE, II.

INJUNCTION.

- I. *Injunction to stay waste or trespass.*
- II. *Injunction to stay proceedings at law.*

III. *Injunction for other purposes.*

IV. *Disolving injunction.*

- I. *Injunction to stay waste or trespass.*
1. An injunction to stay waste will be granted, though there is no suit pending, and though no action at law can be maintained against the tenant. *Kane v. Vanderburgh and others,*, 11
2. An injunction is not allowed, in order to prevent the repetition of a trespass in entering and cutting down timber, on land of which the plaintiff is in possession as owner, and has adequate remedy at law for the trespass. *Stevens v. Beekman and others,*, 318
3. Though, it seems, an injunction may be allowed in a case of trespass under very special circumstances, *ib.*

4. Injunction lies to prevent a lessee's making material alterations in a dwelling house, by changing it into a ware house or store, which would produce permanent injury to the building. *Douglass and others v. Wiggins and another,* 435
5. A mortgagor who has sold his equity of redemption, without taking any security as indemnity against his bond, cannot have an injunction to stay waste, against his vendee, on the ground that he will be answerable for what the land may fail to satisfy the mortgage. *Brumley v. Fanning & Devoe,* 501
- II. *Injunction to stay proceedings at law.*
6. An injunction will not be granted to stay a sale under an execution, on the ground that the judgment has been fully paid and satisfied; for the party has a prompt and adequate remedy at law. *Lansing v. Eddy,* 49
7. Nor will it be granted on the charge of usury, and the party seeks a *discovery* of the usury, and a return of the excess beyond the lawful interest; for the usury would have been a good defence at law; and no reason was given why the defendant did not seek the discovery while the suit at law was pending, *ib.*
8. Chancery will not relieve against a judgment at law, unless the defendant was ignorant of the fact in question pending the suit, or it could not be received as a defence, *ib.*
- S. P. *Simpson v. Hart,* 98
9. Where a court of common law, after a full consideration of all the circumstances of the case, refused to allow two judgments to be set off, this court refused to sustain a bill filed for an injunction and a set-off. *Simpson v. Hart,* 91
10. An injunction will not be granted to stay proceedings at law, on a judgment, on the ground that the defendant at law was prevented, by public business, from making due preparations for, and attending at the trial, and that the plaintiff had, on the evidence of one witness whom he had suborned to swear falsely, recovered a verdict for a much larger sum in damages than he was justly entitled to; and that the supreme court had refused to grant a new trial in the cause. *Smith & Mead v. Lowry,* 320
11. The cases of relief in equity, against judgments at law, founded in fraud, are, when the fraud goes to the whole judgment, and not to the mere excess of damages in a case properly sounding in damages; and when the fraud could not have been met and defeated at the trial. S. C. 323
12. On a bill for discovery on a charge of usury, an injunction will not be granted to stay proceedings at law on the note, or usurious contract, unless the plaintiff tenders, or brings into court, the money actually lent, and the lawful interest thereon. *Rogers v. Rathbun,* 367
- S. P. *Tupper and another v. Powell and others,* 439
13. This court will not grant an injunction to stay an action at law on an award, on the ground that the plaintiff was surprised by the principal witness for the defendants swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would

- have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time of making the award. *Woodworth v. Van Buskirk and Slocum,* 492
14. Where a defendant in an action at law, has not used due diligence in making his defence, or in applying to this court for a discovery, to assist his defence at law, if necessary, he cannot, after a verdict against him, obtain the aid of this court to stay the proceedings at law, or to have a new trial. *Barker v. Elkins and Simpson,* 465
15. It seems, that this court will not sustain a bill of discovery and an injunction, merely to procure such admissions by the party as might be used in mitigation of damages, in an action of trespass at law, unless, perhaps, in very special cases. *Gelston & Schenck v. Hoyt,* 543
18. As where a turnpike company, incorporated with the exclusive privilege of erecting toll gates and receiving toll, had duly opened and established the road, with gates, &c.; and certain persons, with a view to avoid the payment of toll, opened a by-road near the turnpike, and kept it open at their own expense for the use of the public, by which travellers were enabled to avoid passing through the gate and paying toll to the plaintiffs; the court granted a perpetual injunction to prevent the defendants from using, or allowing others to use, such road, and ordered the same to be shut up. *Croton Turnpike Co. v. Ryder and others,* 611
19. An act of the legislature for the incorporation of a bank, appointed certain commissioners, for the special and sole purpose of receiving subscriptions, and they were directed "to apportion the excess of shares among the several subscribers, as they should judge discreet and proper." A bill was filed, charging inequality and partiality in making the apportionment, and an injunction granted: the commissioners, in their answer, denied the allegation of partiality, and the injunction was dissolved. *Haight and others v. Day and others,* 18

Vide JUDGMENT, 1. 5.

Injunction to stay proceedings for the performance of an award, *vide AWARD.*

III. Injunction for other purposes.

16. Injunction granted to stay proceedings on power of sale in a mortgage, on payment of costs by plaintiff, and his paying into court the amount reported to be due by a master. *Hine v. Handy,* 6
17. An injunction will be granted to secure to a party the enjoyment of a privilege conferred by statute, of which he is in the actual possession, and when his legal title is not put in doubt. *Croton Turnpike Company v. Ryder & others,* 611

IV. Dissolving injunction.

20. If the answer denies all the equity of the bill, the injunction to stay proceedings, at law, will be dissolved of course; otherwise, it will be continued until the hearing; and where it may be necessary to ascertain any matter of fact, for the information of the court, it must be on an issue at

- law, awarded for that purpose.
Hoffman v. Livingston, 211
21. Affidavits, *ex parte*, cannot be read in opposition to a motion made, on the coming in of the answer, to dissolve an injunction restraining one co-partner from using the co-partnership name, or doing any act relative to the partnership concern, or in support of the allegations in the bill.
Eastburn and Downes v. Kirk,
444

INQUISITION OF LUNACY.

Vide Idiots and Lunatics, 2, 3, 4, 5.

INSOLVENT.

1. The assignees of an insolvent, who had obtained his discharge under the insolvent act, must be parties to a bill brought to enforce the execution of an agreement, or trust, relative to his estate, existing prior to his assignment.
Moran v. Hayes, 339
2. A re-assignment to the insolvent, by his assignees, of all the residuary interest in his estate, made without the assent of the creditors of the insolvent, interested in the residuum, is void,
ib.

INSURANCE.

Vide Pleading, IV. 33.

INTEREST.

1. Interest upon interest, or compound interest, is never allowed, unless in special cases; as where there is a settlement of the accounts between the parties, after interest has become due, or there has been an agreement for that purpose, subsequent to the

- original contract; or a master's report, computing the amount of principal and interest, has been confirmed. *The State of Connecticut v. Jackson,* 13
Vide Barrow and others v. Rhinelander, 550
2. An agreement made at the time of the original contract, to allow interest upon interest, as it should become due, is not to be supported. *The State of Connecticut v. Jackson,* 14. 16
3. Rule for casting interest where partial payments are made. S. C.
17

4. Where an administrator employed the moneys belonging to his testate's estate, in trade, for his own benefit, of the profits of which he refused to give any account, the master, in stating an account, after allowing a reasonable time for the settlement of the estate, charged compound interest, making annual rests in the accounts for that purpose, which was confirmed by the court.
Schieffelin v. Stewart and others, 620

J

JOINT OWNERS.

Vide Commissions, 2.

JUDGMENT.

- I. Priority and lien of judgments and executions.
- II. Set-off of judgments.
- I. Priority and lien of judgments and executions.
1. A judgment, *at law*, is not a lien

- upon a mere equitable interest in land; and the execution under it will not pass an interest which a court of law cannot protect and enforce. *Bogart v. Perry and others,* 52
2. A. being seized of land, agreed to sell and convey the same to B., for a certain sum, part of which was to be paid down, and the residue in three annual instalments; and A. was to execute a deed to B., on his paying the second instalment, and securing the residue by mortgage. B. paid the part down, and entered into possession, but neglected to pay the instalments; and, more than two years after they had become due and payable, B. assigned the contract to S., who took possession of the land, and made valuable improvements thereon; and S., without performing the contract with A., assigned it, and all his interest, to P., with knowledge, however, of a judgment existing against S., before such assignment. It was held, that the mere right in equity of S., as assignee of B., against A., on the contract for the sale of the land, was not the subject of *lien*, or judgment and execution, *ib.*
3. A sale under a second, or junior judgment, is not, of itself, a waiver of the plaintiff's rights under a first or elder judgment. *Shotwell v. Murray,* 512
4. Where a person purchased under a junior judgment, with notice of the prior judgment, but supposing, erroneously, that the *lien* of the former judgment was thereby extinguished, it was held, that every person was bound to know the law; and that, where there was no mistake as to the fact, but only as to the legal consequence,
- and that on a collateral point, there could be no ground for relief, either by vacating a sale, or by a perpetual injunction against the exercise of the defendant's rights: and that the purchaser took the land subject to the *lien* of the former judgment. *Shotwell v. Murray,* 512
5. A. having two judgments, of different dates, against G., issued execution on the second, under which the land of the debt or was advertised for sale by the sheriff. A. was present at the sale, and gave directions, but was entirely silent about the first judgment, and as to any intention, afterwards, to enforce it. B. having some claim to the land, in order to protect his title, became the purchaser at the sheriff's sale, and received a deed, though he previously knew of the existence of both judgments. B. filed a bill for a perpetual injunction against A.'s proceeding under the first judgment, on the ground of mistake, or fraud: but the bill was dismissed, with costs, *ib.*

Judgment relieved against in favour of purchasers, *vide FRAUD*, 4.

II. Set-off of judgments.

1. Judgments, not only in the same court, but in different courts, may be set off against each other, at law; and the powers of courts of law, in allowing such set-off, does not depend upon statute, but on the general jurisdiction of the court over its suitors. *Simpson v. Hart,* 91
2. Where a party applied, in the first instance, to a court of law, to allow the set-off, and that court, after a full consideration of all

the circumstances of the case, refused to allow it, this court refused to sustain a bill filed for an injunction and a set-off. *Simpson v. Hart*, 91

JURISDICTION.

1. It seems, that where a statute gives to certain persons a discretion in a particular case, and for a special purpose, a mistake of judgment, in that case, cannot be reviewed and corrected by the court. *Haight and others v. Day and others*, 18
2. But their power may be controlled, if exercised in bad faith, and against conscience. S. C. 21
3. The jurisdiction of chancery, in awarding partition, is well established. *Wilkin and others v. Wilkin*, 117
4. The peculiar state of property, and the oppressive nature of the litigation at law, as to the title, afford a proper ground for the equitable jurisdiction of this court. *Nicoll v. Trustees of Huntington*, 166
5. And the party may either come into equity, first to have his title tried at law under its superintendance, or he may have the title established at law before he comes to this court; and where the title is once established to the satisfaction of the court, either upon its own view of the testimony, or by verdict on one or more issues, awarded at its discretion, it will declare in whom the right exists, by a decree, and protect that right by a perpetual injunction, ib.
6. But if the plaintiff, from his own case, does not show enough, or fails to make out a title by evidence, his bill will be dismissed without awarding an issue, ib.
7. This court has power to order a bond or other instrument to be delivered up to be cancelled, whether such instrument is, or is not, void at law, or whether it be void on the face of it, or by matters shown by the proofs in the cause: but the exercise of this power rests in the sound discretion of the court, and is regulated by the circumstances of each particular case. *Hamilton v. Cummings*, 517
8. Where a bond is good on the face of it, but had been held by the defendant for 27 years, and he admitted that it was given on a trust which he ought not to disclose, and depended on a contingency which had not happened, though it might by possibility happen, the court ordered the bond to be delivered up and cancelled, ib.
9. So, where a bond conditioned to pay a certain sum, and good on the face of it, and on which a suit at law was pending, and the obligor had a good defence in equity, arising from matter *dehors* the bond, it was ordered to be delivered up, ib.
10. Where the intention is manifest, this court will always relieve against mistakes in agreements; and that as well in the case of a surety, as in any other case. *Wiser v. Blackly*, 607

Jurisdiction in cases of adultery, *vide*
ADULTERY, 3, 4, 5.

Jurisdiction in aid of a court of law,
vide DISCOVERY, 1, 2.

Jurisdiction over guardians, *vide*
GUARDIAN, 5, 6.

Jurisdiction in relation to idiots and
lunatics, *vide* IDIOTS AND LUNATICS.

L.

LACHES AND LENGTH OF TIME.

1. A bill filed in 1809, for an account as to transactions before, and at the commencement of, the *American* war, was dismissed on the ground of the staleness of the demand; 26 years having elapsed from the end of the war before the bill was filed, and no cause shown for the delay; and especially as against the representatives of the opposite party, who had no knowledge of the original transactions. *Ellison v. Moffatt and others,* 46
2. In a suit between the representatives of a father, and the representatives of his son, where all the matters in controversy were referred to a master, the court refused to allow the exceptions made to the report; the transactions being very stale and ancient, and most of them family dealings and concerns, and the parties, and their witnesses, having been fully examined before the master. *Arden's Executors v. Arden's Executors,* 313
3. Though the statute of limitations is no bar to a *legacy*, yet the court, in regard to very stale demands, will adopt the provisions of the statute, in the exercise of their discretion, *ib.*
4. Though a lapse of 30 years affords a presumption that a legacy has been paid, yet that presumption may be repelled by circumstances, *ib.*

Lapse of time a bar to a divorce, *vide ADULTERY*, 8, 9.

Lapse of time a bar to an equity of redemption, *vide MORTGAGE*, III. 14, 15, 16.

Et vide AGREEMENT, II. 9.

LEGACY.

1. Though the statute of limitations is no bar to a *legacy*, yet the court, in regard to very stale demands, will adopt the provisions of the statute, in the exercise of their discretion. *Arden's Executors v. Arden's Executors,* 313
2. Though a lapse of 30 years affords a presumption that a legacy has been paid, yet that presumption may be repelled by circumstances, *ib.*

Vide EXECUTOR AND ADMINISTRATOR, II. 7, 9, 10.

LIEN.

Vide JUDGMENT, I. VENDOR AND PURCHASER, 1, 2, 8.

LIS PENDENS.

Vide VENDOR AND PURCHASER, 4, 5, 6, 7. NOTICE, 6, 7, 8, 9.

LOAN.

Vide DEBTOR AND CREDITOR, 1, 2, 3, 4.

LUNATICS.

Vide IDIOTS AND LUNATICS.

M.

MARRIAGE.

Though an absence of five years. of

one of the married parties, may exempt the other, who marries again, from the penal consequences of bigamy, under the provisions of the act, (1 N. R. L. 113.) yet the second marriage is null and void; for nothing but the death of one of the parties, or the judicial decree of a competent court, can dissolve the marriage tie. *Williamson v. Parthen*, 389

MARRIAGE SETTLEMENT.

Vide BARON AND FEME.

MERGER.

Vide DESCENT.

MONEY.

Money means gold or silver, or the lawful currency of the country, or bank notes, where they are known and used in the market as cash, or money deposited in bank for safe keeping; and does not comprehend promissory notes, bonds, and mortgages, or other securities. *Mann and others v. The Executors of Mann*, 231

MORTGAGE.

I. *Of the mortgage generally.*

II. *Registry of mortgages.*

III. *Equity of redemption, foreclosure, and sale.*

IV. *Account between mortgagor and mortgagee.*

I. *Of the mortgage generally.*

1. Expenses of security are to be

paid by mortgagor. *Hine v. Handy*, 7

2. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that the defeasance had been destroyed by fraud or mistake. *Markes and others v. Pell*, 594
3. But where a bill was filed for an account, and for a reconveyance, 30 years after the deed, alleged to be a mortgage, was given, during all which time the defendant had been in possession, parol evidence of the mere confessions of the defendant, made 17 years after the deed, that it was taken as security for a debt, was held insufficient, ib.

Vide EVIDENCE, II. 12.

II. Registry of Mortgages.

4. The registry of a mortgage is notice to subsequent purchasers. *Frost and others v. Beckman*, 298
5. P. Parkist v. Alexander and others, 394
6. So, the registry of a mortgage given to secure three thousand dollars, but, by the mistake of the clerk, registered for three hundred dollars, is notice to subsequent bona fide purchasers, to the extent only of the sum expressed in the registry, ib.
7. An unauthorized registry of a mortgage, or one registered without any previous proof or acknowledgment, would not, it seems, be notice to a subsequent purchaser. S. C. 300
8. The mortgagee is not bound to inspect the record, and see that the registry is correct: this is the

- exclusive business and duty of the clerk. *Frost and others v. Berkman*, 300
9. Equity gives no assistance against a purchaser for a valuable consideration without notice, *ib.*
10. But whenever actual notice of the true sum in the mortgage can be brought home to the purchaser, he is, from that time, so far as the former purchase is left incomplete, either as to the deed, on the one hand, or as to payments, on the other, bound by the prior equitable lien ; and all subsequent payments by him are made in his own wrong, so far as the rights of the mortgagee are concerned. *S. C.* 301
11. Notice of an encumbrance stops all further proceedings towards the completion of the purchase, or payment of the money, *ib.*
12. It seems that the registry of a mere equitable mortgage, or encumbrance, is notice to the subsequent purchaser of the legal estate, so as to entitle such mortgage to a preference. *Parkist v. Alexander and others*, 394
- III. *Equity of redemption, foreclosure, and sale.*
13. Injunction granted to stay proceedings on power of sale, on payment of costs by the plaintiff, and his paying into court the amount reported to be due by a master. *Hine v. Handy*, 6
14. Possession by the mortgagee, for a period short of twenty years, will not bar the equity of redemption ; the possession must be an actual, quiet, and uninterrupted possession, for 20 years, or a period sufficient to toll the right of entry at law. *Moore v. Cable*, 385
15. No length of time is a bar to a *VOL. I.* 4 P
- redemption of a mortgage, where there is fraud in the transaction, or where, by the agreement of the parties at the time, the mortgagee is to enter and keep possession until he is paid out of the profits. *Marks and others v. Pell*, 594
16. Where a mortgage is given to secure a sum, payable in instalments, with interest, and, on default in payment of the first instalment, a bill is filed by the mortgagee, the defendant will not be allowed to stay proceedings, on bringing into court the principal and interest due, with the costs which had accrued, unless he also put in an answer, confessing the debt, &c. or consent to a decree of foreclosure, to remain subject to the further order of the court upon a subsequent default. *Lansing v. Capron and others*, 617
17. And it seems that, in such case, if the subsequent instalments are punctually paid, the defendant will not be charged with the further costs, *ib.*
18. Sale of mortgaged premises, under a decree, will not be postponed merely on account of the existence of war ; war, as a general calamity, not being sufficient to justify the court in interrupting the regular administration of justice, and the collection of debts. *Astor v. Romayne and others*, 310
19. But if it should be made satisfactorily to appear, that there was any immediate or impending calamity over the city, or place, where the mortgaged premises were situated, which would cause a suspension of all civil business, the court would interfere, and postpone the sale, *ib.*

20. A sale of mortgaged premises was postponed for six weeks, to give the mortgagor an opportunity to comply with the proposal of the mortgagee, such delay being equally beneficial to both parties. *Astor v. Romayne and others,* 310

Contribution between co-debtors, mortgagors, &c. *vide CONTRIBUTION.*

Dower of widow of mortgagor, *vide DOWER*, 1, 2.

Surplus remaining after sale, *vide EXECUTOR AND ADMINISTRATOR*, I.

Vide INJUNCTION, I. 5.

IV. Account between mortgagor and mortgagee.

21. A mortgagee, or assignee of a mortgagee in possession, is not to be allowed for his improvements in clearing wild land, but only for necessary reparations, &c.; and must account for the rents and profits received by him, except such as have arisen, exclusively, from his own improvements. *Moore v. Cable*, 385

Vide INJUNCTION, I. 5.

N

NE EXEAT REPUBLICA.

1. A writ of *ne exeat republica* cannot be granted for a debt due and recoverable *at law*. It is applied only to equitable demands. *Seymour v. Hazard*, 1
2. And it must not only be an equitable demand, but one in the nature of a debt actually due, *ib.*

3. Where a wife had filed a bill for *alimony*, &c. against her husband, and it appeared that he had abandoned her without any support, and threatened to leave the state, the court, on the petition of the wife, granted a *writ of ne exeat republica* against the husband. *Denton v. Denton*, 364

4. On application for a writ of *ne exeat republica*, by a wife against her husband, pending a suit for alimony, &c. her affidavit is admissible, the proceeding being *ex parte*, and the wife, in that respect, considered as independent of her husband. S. C. 441

5. A writ of *ne exeat* may be granted prior to any decree for alimony, *ib.*

6. And the court, in making the writ, will exercise a sound discretion, under the special circumstances of the case, having due regard to the rank of the parties, and property of the husband, so as to prevent oppression or extortion, *ib.*

NEW TRIAL.

1. Where a court of law has refused a new trial, the party will not be relieved in equity, at least, upon the same merits already discussed, and fully within the discretion of a court of law. *Simpson v. Hart*, 97
2. A new trial will not be granted, merely to give a party, who has gone voluntarily to trial, an opportunity to impeach the testimony of witnesses, of the object of whose evidence he was apprized beforehand. *Woodsworth v. Van Buskirk & Slocum*, 432
3. He must, at least, show, that he had since discovered testimony of which he had no knowledge before the trial, *ib.*

4. Where a defendant, in an action at law, has not used due diligence in making his defence, or in applying to this court for a discovery, to assist his defence at law, if necessary, he cannot, after a verdict against him, obtain the aid of this court to have a new trial. *Barker v. Elkins & Simpson,* 465

*Vide INJUNCTION, II. 8. 10, 11,
12. 14.*

NICOLL'S PATENT.

Vide PATENT.

NON-RESIDENT PLAINTIFF.

Vide COSTS, III. 13.

NOTICE.

1. A purchaser without notice, from one who has fraudulently purchased, is not affected by the fraud. *Bumpus v. Platner and others,* 213
2. And a purchaser, with notice to himself, from one who purchased without notice of the fraud, may protect himself under the first purchaser, *ib.*
3. Equity gives no assistance against a purchaser for a valuable consideration without notice. *Frost and others v. Beekman,* 300
4. Notice of an encumbrance stops all further proceedings towards the completion of the purchase, or payment of the money. *S. C.* 301
5. A party claiming relief in equity, as a *bona fide* purchaser, must positively and precisely deny all notice, though it is not charged. *S. C.* 302.
- S. P. *Murray & Winter v. Ballou & Hunt,* 566

6. A *lis pendens*, duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree; and the pendency of the suit is deemed to commence from the service of the subpoena, after the bill is filed. *Murray & Winter v. Ballou & Hunt,* 566
7. A purchaser of A., a trustee, is not chargeable with notice of the trust, by means of the registry of a deed from H. to B., reciting that A. had executed a declaration of the trust, *ib.*
8. If a purchaser has notice of the trust, at the time of purchase, he himself becomes a trustee, notwithstanding the consideration he has paid, *ib.*
9. A purchaser of land chargeable with constructive notice only, by means of a *lis pendens*, is not to be charged with costs, there being no actual fraud, though the purchase is set aside on the ground of the implied fraud, *ib.*
10. Whether a latent equity in a third person will defeat a *bona fide* assignee, without notice of his rights, except it be an assignment by an executor, which carries on the face of it notice of his fiduciary character? *Quære,* *ib.*

*Vide FAILURE OF CONSIDERATION.
FRAUDULENT CONVEYANCES, I. 5.
MORTGAGE, II.*

P

PARENT.

Vide GUARDIAN, 1, 2.

PARTITION.

This court will not sustain a bill for a partition, where the title is de-

ties, or is not clearly established; but the bill will be retained to give the plaintiff an opportunity to establish his title at law. *Wilkin and others v. Wilkin*, 111

PARTNERSHIP.

1. Where articles of copartnership stipulated, that the *capital* and *profits* of the company should remain in the house, and be employed, during the copartnership, for the benefit of the concern, each party being at liberty to withdraw from the joint funds so much only as was necessary for his private expenses; it was held, that neither party had a right to withdraw from the funds money to purchase plate, household furniture, carriages, horses, &c. but only for family expenses, and the reasonable education of children, &c. *Stoughton v. Lynch*, 407
2. And where the partner lived in his own house, a charge for house rent was disallowed, ib.
3. If one partner withdraws or uses the partnership funds, in his own private trade, or speculations, he must account not only for the interest on the moneys so withdrawn, but for the profits of that trade, ib.
4. Joint owners, or partners, are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose. *Franklin and others v. Robinson*, 158
5. Where A. and B. carried on trade, as partners, with the funds of A., in the name of B., and without any dissolution of the partnership, or rendering any account to A., B.

afterwards, without the consent of A., entered into a partnership with C., and carried into the new concern all the funds of the former partnership; and A., on the death of B., filed a bill against his administratrix, and C., his surviving partner, for a discovery and account: it was held, that he was entitled to an account from C. of the transactions and profits of the partnership between him and the intestate, and of the personal estate of the intestate in his hands. *Long v. Majestre and Tardy*, 305

Vide INJUNCTION, IV. 21. *PRACTICE*, IV. 17.

PATENT.

The patent to *William Nicoll*, of the 4th of June, 1688, of certain islands on the south side of *Long Island*, does not extend to *Captree Island*, *Oak Island*, and *Grass Island*. *Nicoll v. Trustees of Huntington*, 166

PENDENCY OF SUIT.

Vide NOTICE, 6. 9.

PERFORMANCE.

Vide AGREEMENT, II.

PETITION.

Petition of appeal, *vide APPEAL*.

Petition to set aside decree, *vide DECREE*, 4.

PLEADING.

I. Parties.

II. Bill.

III. Answer.

IV. Demurrer.

I. Parties.

1. A creditor filing a bill against an executor, cannot make a debtor of the estate a party, except where the executor is insolvent, or there is collusion between the executor and debtor, or in some other special case. *Long v. Magistre and Tardy*, 305
2. The assignees of an insolvent, who had obtained his discharge under an insolvent act, must be parties to a bill, brought to enforce the execution of an agreement, or trust, relative to his estate, existing prior to his assignment. *Moran v. Hays*, 339
3. The general rule requiring all persons interested to be made parties to the suit, is confined to parties to the interest involved in the issue, and who must, necessarily, be affected by the decree. *Wendell v. Van Rensselaer*, 349
4. It is a rule of convenience merely, and may be dispensed with when it becomes extremely difficult or inconvenient, ib.
- S. P. *Wiser v. Blachly and others*, 437
5. Individual members of a corporation may be called upon to answer to a bill of discovery under oath; but, in that case, the individuals must be named as defendants in the bill. *Brumley v. Westchester Manufacturing Society*, 366

6. Where a bill was filed against a corporation generally, who put in an answer under their corporate seal, the court refused, on motion, to order certain officers of the corporation to make oath to the answer so filed. *Brumley v. Westchester Manufacturing Society*, 366
7. A creditor, or legatee, of the personal estate, need only make the personal representatives of the debtor parties to the suit; and, in many cases, where it will be attended with extreme difficulty, or very great inconvenience, the general rule will be dispensed with. *Wiser v. Blachly and others*, 437
8. But, on a bill against the executors of a guardian, for a breach of his trust, the testator having, by his will, made the timber on his land assets for the payment of his debts, it was held that the devisee of the real estate ought to be made a party, as the whole estate might become responsible to the plaintiff, ib.
9. The parties can only be known in the character in which they appear before the court; therefore, if a bill of revivor states the plaintiffs to be the heirs and devisees of the party deceased, though some of them, in fact, are executors, yet they can only be known in their former character, and not as executors. *Travis and others v. Waters*, 85
- II. Bill.
10. The general interrogatory, or requisition, in the bill, "that the defendant may full answer make, to all and singular the premises, fully and particularly, as though the same were repeated, and he specially interrogated, paragraph

- by paragraph, with sums, dates, and all attending circumstances and incidental transactions," is sufficient to entitle the plaintiff to a full disclosure of the whole subject matter of the bill, equally as if he had specially interrogated the defendant to every fact stated in the bill. *Methodist Episcopal Church and others v. Jaques and others,* 65
11. If a bill, beside the usual prayer for general relief, contain a prayer for specific relief, the plaintiff is entitled to other specific relief, so far as it is consistent with the case stated in the bill. *Wilkin and others v. Wilkin,* 111
12. The substance of a bill must contain ground for relief; and there must be equity in the case, when fully stated, and correctly applied to the proper parties, sufficient to warrant a decree. *Lyon v. Tallmadge,* 188
13. It seems, that a cross bill must be filed before publication is passed in the first cause. *Sterry v. Arden and others,* 62
- Amending bill, vide AMENDMENT.**
- III. Answer.**
14. If a defendant submits to answer a bill of discovery, &c. he must answer fully, except in certain cases, as where the discovery may tend to criminate him, or where he is a purchaser for a valuable consideration. *Methodist Episcopal Church and others v. Jaques and others,* 65
15. If the defendant rests himself on a fact, as an objection to a further discovery, it ought to be such a fact as, if true, would, at once, be a clear, decided, and inevitable bar to the plaintiff's demand. *Methodist Episcopal Church v. Jaques and others,* 65
16. A defendant is bound in his answer to admit, or deny, all the facts stated in the bill, with all their material circumstances, without any special interrogatories in the bill for that purpose, *ib.*
17. The defendant must answer, specifically, to the specific charges in the bill, and give the best account he can, so as to enable the plaintiff, if he calls for an account, to possess materials to state an account. *S. C.* 76
18. Exceptions to an answer for impertinence, as well as insufficiency, are made in writing, and referred, at the same time, to the master, and are disposed of together. (This is different from the practice of the court of chancery in *England.*) *Woods v. Morrell and others,* 103
19. The best rule to ascertain whether matter be impertinent, is to see whether the subject of the allegation could be put in issue; or be given in evidence between the parties, *ib.*
20. An answer ought not to go out of the bill, to state what is not material or relevant to the case stated in the bill, *ib.*
21. Long recitals, stories, conversations, and insinuations tending to scandal, are impertinent, *ib.*
22. So, facts not material to the decision are impertinent, and, if reproachful, are scandalous, *ib.*
23. But if the plaintiff will put impertinent questions, he must take impertinent answers. It will depend, however, on the reason of the thing, and the nature of the case, how far a general inquiry will warrant an answer leading to particular details, *ib.*
24. The defendant must answer di-

- rectly and precisely to every material allegation in the bill, and not by way of a negative pregnant. The charges are not to be answered literally; but the defendant must confess or traverse the substance of each charge positively, and with certainty. *Woods v. Morrell and others,* 103
25. Particular and precise charges must be answered particularly and precisely, and not generally, though the general answer may amount to a full denial, *ib.*
26. If a fact is charged to be within the defendant's personal knowledge, he must answer positively, and not to his remembrance or belief; and as to facts not within his own knowledge, he must answer as to his information and belief; not as to his information or hearsay, without stating his belief one way or the other, *ib.*
27. A party claiming relief in equity, as a *bona fide* purchaser, must positively and precisely deny all notice, though it be not charged. *Frost and others v. Beekman,* 283
- S. P. Murray & Winter v. Ballou & Hunt,* 566
28. Whatever is essential to the right of the party, and is necessarily within his knowledge, must be positively and precisely alleged. *Frost and others v. Beekman,* 302
29. If a *feme covert*, who is a defendant, puts in an answer separately from her husband, without leave, the court, on motion, will quash it. *Perine v. Swaine,* 24
- Vide INJUNCTION, IV. 20.*
- Exceptions to answer, *vide PRACTICE, III.*
30. A demurrer to a bill in equity must be founded upon some dry point of law, which goes to the absolute denial of the relief sought. *Verplanck and others v. Caines and wife,* 57
31. If the demurrer is bad in part, it is bad *in toto*, *ib.*
32. The appointing a receiver rests in the sound discretion of the court; and it forms no ground for a demurrer to a bill praying for the appointment, *ib.*
33. A bill filed to recover the amount of a total loss on a policy of insurance, stating no other ground of equitable relief, than that the policy had been assigned to the plaintiffs by the insured, in whose names it had been effected, and that the insurers refused to pay, was, on demurrer, dismissed with costs, the plaintiffs having adequate remedy at law. *Carter and Moore v. United Insurance Company,* 463
- POLYGAMY.**
- Vide MARRIAGE.*
- POWER OF SALE IN MORTGAGE.**
- Vide MORTGAGE, III. 13.*
- PRACTICE.**
- I. *Bill taken pro confesso.*
- II. *Appearance.*
- III. *Exceptions to answer.*
- IV. *Motions.*
- V. *Reference to master, report, exceptions.*

VI. Taking testimony, feigned issue, and other intermediate proceedings.

VII. Hearing and rehearing.

I. Bill taken pro confesso.

1. If a defendant, after an appearance, will not answer, the bill will be taken *pro confesso*. *Caines v. Fisher and M'Lachlan*, 8
2. Where the bill is for relief only, and states sufficient ground, it is not necessary to prosecute a party to a contempt and sequestration, before taking the bill *pro confesso*, *ib.*
3. Otherwise, where an answer is essential, as in bills of discovery; there, it must be compelled by process for contempt, *ib.*
4. If, after appearance, no answer is put in, according to the rules of the court, the defendant will be ordered to file his answer by the first day of the next term, or that, on proof of service of the order, the bill will be taken *pro confesso*, *ib.*
5. A defendant, who has suffered the bill to be taken *pro confesso*, and a decree, by default, to be entered against him, may, under the special circumstances of the case, be let into a defence, on terms; it resting in the sound discretion of the court to relieve the party, or not, from the consequences of his default. *Wooster and others v. Woodhull*, 539
6. But where there had been gross negligence on the part of the defendant, and the principal and most material witness of the plaintiff had died since the bill was filed, the court refused to relieve the defendant, as opening the decree would produce irreme-

diable injury to the plaintiff. *Wooster and others v. Woodhull*, 539

7. A decree fairly and regularly obtained, by default, for want of answer, will not be set aside to let in a defence founded on a fraudulent speculation. *Parker and Bliss v. Grant and others*, 630
8. The application, in such a case, is to the grace and favour of the court; and the defendant must show that he is deserving of favour,

II. Appearance.

9. Infants cannot, by their solicitor or counsel, petition the court to be relieved from the necessity of depositing the sum required by the rules of the court, on entering their *appeal* from a decree; but must, as in all other cases, appear by their guardian or next friend. *Bradwell v. Weeks*, 325

Vide ante, I.

III. Exceptions to answer.

10. Exceptions to an answer for impertinence, as well as insufficiency, are made in writing, and referred at the same time to the master, and are disposed of together. (This is different from the practice of the court of chancery in England.) *Woods v. Morrell and others*, 103
11. If exceptions are taken to an answer, and the defendant submits to the exceptions by putting in a further answer, the plaintiff, if he thinks the second answer not sufficient, should, within a reasonable time, say *three weeks*, obtain an order to refer the answer to

- the master for insufficiency.
Sanford v. Biessel and others, 383
12. And the plaintiff ought, either in the order of reference, or by notice to the defendant, to specify to which of the exceptions the second answer is still imperfect, *ib.*
13. Where exceptions to an answer were taken in November, and the defendant put in a second answer in December, and the plaintiff, in March following, obtained a rule of reference to the master, without any notice to the defendant, the plaintiff was deemed to have acquiesced in the second answer, and the order of reference was set aside, *ib.*
14. And though the second answer was not accompanied with an offer to pay the costs of the exceptions, which the defendant, in such case, is regularly bound to pay; yet, as the plaintiff made no objection on that ground, nor called on the defendant for the costs, he was precluded from making that objection afterwards, *ib.*

IV. Motions.

15. Where a motion, on some interlocutory matter, in a cause, has been once heard and decided on, it cannot be repeated, unless on a new ground. *Huffman v. Livingston*, 211
16. It is not enough that additional evidence is offered by the affidavits of the matter urged in support of the former motion; nor can affidavits be received on such motion to aid the answer of the defendant, *ib.*
17. Affidavits, *ex parte*, cannot be read in opposition to a motion made on the coming in of the answer, to dissolve an injunction
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- restraining one copartner from using the copartnership name, or doing any act relative to the partnership concern, or in support of the allegations in the bill. *Eastburn & Downes v. Kirk*, 444
18. The admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in waste, or in cases where irreparable mischief might ensue, *ib.*
19. A regular decree on the merits cannot be set aside on motion. *Radley and others v. Shaver and others*, 200

V. Reference to master, report, exceptions.

20. In a suit between the representatives of a father, and the representatives of his son, where all the matters in controversy were referred to a master, the court refused to allow the exceptions made to the report; the transactions being very stale and ancient, and most of them family dealings and concerns, and the parties, and their witnesses, having been fully examined before the master. *Arden's executors v. Arden's executors*, 313

VI. Taking testimony, feigned issue, and other intermediate proceedings.

21. Where publication had passed in a cause, without any witnesses being examined on either side, the court refused, especially after the lapse of more than two years from the time of the filing the bill, to open the rule for publication, on the affidavit of the plaintiff of the discovery of a witness who would prove a material fact in the cause, denied in the answer. *Smith v. Brush and others*, 459
22. Nor would the court, under the

- circumstances, award a signed issue in the cause, that being a measure of sound discretion. *Smith v. Brush and others*, 459
23. Liberty to re-examine witnesses rests in discretion, and is to be governed by circumstances. *Boyd & Suydam v. Dunlap and others*, 483
24. It is not of course to enlarge the rule to pass publication, and it will be refused where there has been great delay; but it was granted, until the plaintiffs had sufficiently answered a cross bill of the defendants. *Underhill v. Van Cortlandt and others*, 500
25. Where a replication is filed, and a cause set down for hearing, without any rule having been entered to produce witnesses, it is a waiver of the replication; and the defendants are entitled to the benefit of their answers, as if the cause had been set down on bill and answer. *Wiser v. Blackly*, 607

Examination of witnesses, vide EVIDENCE, III.

Vide INJUNCTION, IV. 20.

VII. Hearing and rehearing.

26. A rehearing rests in the discretion of the court, and is not granted on a decree for costs only, unless under special circumstances. *Travis and others v. Wisters*, 48
27. In two causes against the same defendant, depending on the same facts, the plaintiffs were respectively witnesses for each other; and after publication had passed, and the causes had been set down for a hearing, the defendant filed *cross bills* for discovery, on the ground that the witnesses had not

- fully and satisfactorily answered one of the cross interrogatories. A motion made to put off the hearing of the causes, until answers were put in to the *cross bills*, was refused, it being too late for such an application, and the answers not appearing to be evasive. *Sterry v. Arden and others*, 62
28. On a rehearing, the party that complains of a decree, and seeks to have it corrected, is entitled to open and close the argument. *Sills v. Brown and others*, 444

Examination of witness at the hearing, vide EVIDENCE, III. 21. 23, 24, 25, 26.

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PRESUMPTION.

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RESTRICTION OF ALIENATION.

RECEIVER.

1. The appointing a receiver rests in the sound discretion of the court, and forms no ground for a demurrer to a bill praying for the appointment. *Verplanck and others v. Casines and wife*, 57
2. Where a trustee was restrained by injunction, from interfering with the trust estate, and a receiver appointed by the court, and it became necessary to bring suits at law, to recover the possession of lands, and collect moneys belonging to the trust estate; the court, on application of the *cestuy que trust*, ordered the receiver to bring the suits in the name of the trustee, on giving security to indemnify the trustee on account of such suits; and that the receiver should hold the possession of the lands recovered, and moneys received by him, subject to the further order of the court. *Green and others v. Winter*, 60

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Vide DEVISE, 2.

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RES JUDICATA.

1. A decision of a court of competent jurisdiction, being *res judicata*, is conclusive and binding on all other courts of concurrent jurisdiction. *Simpson v. Hart*, 91
2. A decision of a court of competent jurisdiction, on the point at issue before it, can only be reviewed in the regular course of appeal. *Gelston and Schenck v. Hoyt*, 543
3. The decree of a court of peculiar and exclusive jurisdiction is conclusive on all other courts, *ib.*
4. As where a vessel was seized and libelled in the district court of the *United States*, as forfeited, for being fitted out in violation of an act of congress, to be employed in the service of a foreign state, to wit, that part of the island of *St. Domingo* under the government of *Petion*, to commit hostilities on the subjects of another foreign state, to wit, that part of the same island under the government of *Christophe*, with whom the *United States* were at peace; and the district court dismissed the libel, and ordered the vessel to be restored to the claimant, and refused a certificate of probable cause of seizure; this decree was held conclusive as to the lawfulness of the seizure, *ib.*

RESULTING TRUST.

Vide FRAUDS, (STATUTE OF,) II. 10,
11, 12.

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SALE OF MORTGAGED PREMISES.

Vide MORTGAGE, III.

SECURITY.

Vide MORTGAGE.

SECURITY FOR COSTS.

Vide COSTS, III.

SETTLEMENT.

- Where a woman, before her marriage, executed a deed, to which her intended husband was a party, by which she conveyed all her estate, real and personal, to C., *in trust* to her use, until her marriage, and then to such persons and uses as she, with the consent of her intended husband, should appoint, by deed, or by her last will, without his consent, and the wife retained the deed during life, and executed a deed to her husband's brother, and, also, made a will, disposing of her estate, &c. it seems that this deed, though it might not be legally valid on account of some technical objection to its due delivery, would be good evidence of the agreement, and binding on the husband. *Methodist Episco-*

pal Church and others v. Jaques and others, 65

- A voluntary settlement fairly made, is always binding, in equity, upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and, if he retain it, there must be other circumstances, beside the mere fact of his retaining it, to show that it was not intended to be absolute. *Sawerby and wife v. Arden and others,* 240
- A voluntary settlement, without power of revocation, cannot be revoked. S. C. 258
- A voluntary conveyance or settlement, though retained by the grantor in his possession, until his death, is good. *Bunn and others v. Winthrop and others,* 529
- As between the parties, a voluntary actual transfer, by deed, of a chattel interest, is valid, without any consideration appearing; *ib.*

Vide FRAUDULENT CONVEYANCES, 1, 2, 3, 4, 5.

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SET-OFF OF JUDGMENTS.

Vide INJUNCTION, II. 9. JUDGMENT, II.

SHERIFF.

Vide EXECUTION, 3, 4, 5.

SOLICITOR.

- This court does not ordinarily, and of course, interfere to compel the payment of solicitor's

- fees. *In the matter of Southwick,* 22
 2. Where a commission of lunacy had been executed, and the lunatic, afterwards, discharged from it; but on the disease returning, a new committee was appointed, under a new commission, the court refused, on the petition of the solicitors who sued out and executed the first commission, to pay their costs; there being no special reasons for the summary interference of the court, *ib.*

SPECIFIC PERFORMANCE.

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- 1787, Feb. 20. Sess. 10. c. 37.
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STAYING PROCEEDINGS ON MORTGAGE.

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SUBSTITUTION.

1. If a creditor has a lien on two different parcels of land, and another creditor has a subsequent lien on one only of the two parcels, and the prior creditor elects to take his whole demand out of the parcel of land on which the subsequent creditor has his lien, the latter is entitled either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him, for his benefit. *Cheesebrough and others v. Millard and others,* 409
2. So, if a bond creditor exacts the whole of his demand from one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he were a purchaser, either against the principal debtor or his co-sureties, *ib.*
3. And if the prior creditor has put it out of his power to make the cession, it seems that he will be excluded from so much of his demand as the surety, or subsequent creditor, might have obtained, if the cession could have been made, *ib.*
4. But if the prior creditor, who has disabled himself from making the assignment, has acted with good faith, and without knowledge of the rights of the other creditor, he is not to be injured by his inability to make the cession; the doctrine of substitution being founded on mere equity and benevolence, *ib.*

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T

TENANT BY THE CURTESY.

Where a testator devises his real estate to his daughter, and empowers and directs his executors to sell the real estate, and the daughter marries, and has a child, which dies, and the mother also dies before the sale of the estate, and the husband survives, he is entitled, as tenant by the curtesy, to have the interest of the money arising from the sale secured and paid to him during life, in lieu of the rents and profits of the land. *Dunscomb and others v. Dunscomb's executors,* 508

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TRUST AND TRUSTEE.

I. How trusts are created, and their incidents. *Cestuy que trust, and trust estate.*

II. Authority and duty of a trustee.

III. Trustee's accounts. *Allouances to, and charges against trustee.*

IV. Expenses and compensation of a trustee.

I. How trusts are created, and their incidents. *Cestuy que trust, and trust estate.*

1. Property held in *trust* does not pass to the representatives of the trustee, but, as long as it can be traced and distinguished, it enures to the benefit of the *cestuy que trust*. *Moses and others v. Margatroyd and others,* 119

2. Where a trust is created for the benefit of a person, without his knowledge at the time, he may afterwards affirm the trust, and enforce its performance, *ib.*

3. Collateral securities to creditors are considered as *trusts* for the better protection of their debts; and equity will see that their intention be fulfilled, *ib.*

4. Where no trust appears on the face of a deed, nor any manifestation or evidence of it by writing, parol evidence is inadmissible to show the trust. *Movan v. Hays,* 339

5. Lands purchased by the husband, with the moneys of the wife, are deemed to be held in trust for her, though purchased in his own name; and a third person, to whom the husband had conveyed an estate so purchased, with notice of the manner of his acquiring

- it, was held to be chargeable with the trust. *Methodist Episcopal Church v. Jaques,* 450
6. If a purchaser has notice of a trust at the time of purchase, he himself becomes a trustee, notwithstanding the consideration he has paid. *Murray & Winter v. Ballou & Hunt,* 566
7. If A. purchase land with his own money, but the deed is taken in the name of B., a trust results by operation of law to A.; and the fact whether the purchase was made with the money of A., on which the resulting trust is to arise, may be proved by parol, it not being within the statute of frauds. *Boyd v. McLean,* 582
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- gave his bond, secured by a mortgage on the premises; but when the bond became due, he refused to pay it, but procured a foreclosure and sale of the farm, by the mortgagee, at a loss of above 4,000 dollars, the trustee was held chargeable for this loss, and all the costs of the suits. *Green v. Winter,* 27
12. An executor, administrator, or trustee, is not allowed to make any gain, profit, or advantage, from the use of the trust funds. *Schieffelin v. Stewart and others,* 620

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- II. Authority and duty of a trustee.**
8. A trustee cannot act for his own benefit in a contract on the subject of the trust. *Green v. Winter,* 27
- S. P. *Parkiet v. Alexander and others,* 394
9. So, a trustee, who purchases a mortgage or a judgment, which was a lien on the trust estate, at a discount, is not allowed to turn such purchase to his own advantage. *Green v. Winter,* 27
10. But it enures to the benefit of the trust: a trustee is not permitted to use the information he gains as trustee, by purchasing in for himself; and the principle is the same as to buying in the trust estate, or buying securities upon it, *ib.*
11. Where a trustee agreed to purchase and pay for a farm, at the request and for the use of the *cestuy que trust*, out of the proceeds of the trust estate; and he purchased the farm, for which he
- III. Trustee's accounts. Allowances to, and charges against trustee.**
13. Where G., being indebted to H., conveyed to W. certain bonds and mortgages, and part of the lands sold under the mortgages, and purchased in by W., *in trust*, to sell the same as H. might direct; and "upon payment of such sums as might be justly due to W., in relation to the execution of his trust, or that he might advance or become liable for," to convey to H. the lands and proceeds thereof, and to assign over to H. the bonds and mortgages taken by W., and which might remain in his hands, "after his said advances and responsibilities were secured and satisfied;" and H., afterwards, assigned over all his interest in the trust estate to his sister T., the wife of G., to her separate use, for life, with power to dispose of the same to and among her children: It was held, that payments made by the

- trustee to G., the husband of T., the *cestuy que trust*, were not chargeable on the trust fund; nor, if authorized by T., could the trustee be allowed the benefit of them, in his account, further than what was actually necessary for the support of herself and children; unless it appeared that the husband had applied the payments to the specific purposes of the trust. *Green and others v. Winter*, 26
14. A trustee will not be allowed for expenditures for improvements of the trust estate, though made *bona fide*, as in building houses and mills, clearing land, making roads, &c., such expenses nor being within the purview of the trust, which was to sell the land to raise money to pay off encumbrances, &c., and to restore the residue. He is entitled only to necessary expenditures, as for repairs, &c.; and the *cestuy que trust* has always his option to take, or refuse, the benefit or loss of the unauthorized act of his trustee, *ib.*
15. Nor will the purchase and sale of stock, hay, grain, and farming utensils, &c., be taken into the account of the trust estate, *ib.*
16. Where a trustee, though called on for that purpose, refused to exhibit to referees appointed by the court, by consent of parties, an account of the rents and profits of certain parts of the trust estate, he was held chargeable with what, in the opinion of the referees, such parts of the estate would reasonably have produced, *ib.*
17. Where a trustee agreed to purchase and pay for a farm, at the request, and for the use, of the *cestuy que trust*, out of the proceeds of the trust estate; and he purchased the farm, for which he gave his bond, secured by a mortgage on the premises; but when the bond became due, he refused to pay it, but procured a foreclosure and sale of the farm, by the mortgagee, at a loss of about 4,000 dollars, the trustee was held chargeable for this loss, and all the costs of the suit. *Green and others v. Winter*, 26
18. A trustee for his wife, and a third person who had purchased of the husband, with notice of the trust, were allowed for any beneficial or permanent improvements made on the estate. *Methodist Episcopal Church v. Jaques and others*, 450
19. Where an assignee of property, in trust for the benefit of the creditors of the assignor, having received the proceeds of the property in 1801, neglected, for many years, to distribute the fund among the creditors, pursuant to his trust, he was decreed to pay the amount, with interest, from the time he received the money, and all the costs of the suit brought by the creditors. *Gray v. Thompson*, 82
20. Executors and other trustees are chargeable with interest, if they have made use of the money themselves, or have been negligent, either in not paying over the money, or in not loaning or investing it, so as to render it productive. *Dunscomb and others v. Dunscomb's executors*, 508
- S. P. *Manning and others v. Manning's executors*, 527
21. The time from which interest is to be charged, in case of negligence, varies according to circumstances. *Dunscomb and others v. Dunscomb's executors*, 508

22. Six months from the time the money was received is a reasonable period, in most cases, from which to charge interest against the trustee. *Dunscomb and others v. Dunscomb's executors*, 508
23. Though the general rule is, that executors must pay costs, where they pay interest, because they are in default; yet, where the devisee, or *cestuy que trust*, demands more than he is entitled to receive, and the executor properly submits to the direction of the court, he will not be compelled to pay costs, *ib.*
24. If a trustee negligently suffer the trust moneys to be idle, he is chargeable with simple interest. *Schieffelin v. Stewart and others*, 620
25. If he convert the trust moneys to his own use, or employ them in his business or trade, he is chargeable with compound interest, *ib.*
26. Where an administrator employed the moneys belonging to his intestate's estate in trade, for his own benefit, of the profits of which he refused to give any account, the master, in stating an account, after allowing a reasonable time for the settlement of the estate, charged compound interest, making annual rests in the accounts for that purpose, which was confirmed by the court, *ib.*

IV. Expenses and compensation of a trustee.

27. A trustee cannot demand a compensation for services, beyond what is founded on the positive agreement of the parties. *Green and others v. Winter*, 27

S. P. *Manning and others v. Manning's executors*, 527

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28. And where a trustee, who was a counsellor at law, was to be allowed for "all his advances and responsibilities;" it was held, that though he was entitled to a liberal indemnity for his expenses and responsibilities incurred in the due and faithful execution of his trust, yet he was not entitled to a counsel fee, as a general retainer, nor for any thing more than what is understood, in the language of a court of equity, to be "just allowances." *Green and others v. Winter*, 27
29. A trustee is not entitled to commissions on sales of the trust property, or on moneys received and paid by him, or any compensation for his care and pains in executing the trust; but he is entitled to an allowance *per diem* for his time, and expenses of travel, &c. *ib.*
30. So, an executor is not entitled to compensation, unless given by the will. *Manning and others v. Manning's executors*, 527
31. Whether an agreement with the *cestuy que trust*, subsequent to the creation of the trust, or death of the testator, for the allowance of a commission, be valid? *Quare. S. C.* 532

TURNPIKE.

Where a turnpike company, incorporated with the exclusive privilege of erecting toll gates and receiving toll, had duly opened and established the road with gates, &c.; and certain persons, with a view to avoid the payment of toll, opened a by-road near the turnpike, and kept it open at their own expense for the use of the public, by which travellers were enabled to avoid passing through the gate and paying toll

to the plaintiffs ; the court granted a perpetual injunction to prevent the defendants from using, or allowing others to use, such road, and ordered the same to be shut up. *Croton Turnpike Company v. Ryder and others,*

611

U

USE.

The 4th section of the statute of uses, (sess. 10. ch. 37. 1 R. L. 72.) rendering lands liable to execution against the *cestuy que use*, or *cestuy que trust*, applies only to those fraudulent and covenanted trusts in which the *cestuy que trust* has the whole real and beneficial interest in the land, and the trustee the mere naked and formal legal title. *Bogart v. Perry and others,*

52

USURY.

1. An injunction will not be granted against a judgment at law, on a charge of usury, where the party seeks a discovery of the usury, and a return of the excess beyond the lawful interest ; for the usury would have been a good defence at law ; and no reason was given why the defendant did not seek the discovery while the suit at law was pending. *Lansing v. Eddy,* 49
2. On a bill for discovery on a charge of usury, an injunction will not be granted, to stay proceedings at law on the notes, or usurious contract, unless the plaintiff tenders, or brings into court, the money actually lent, and the lawful interest thereon. *Rogers v. Rathbun,* 367

- S. P. *Tupper and another v. Powell and others,* 439
3. If on application for a loan of money, the sale of shares in an insurance company, at par, is made the condition of the loan, when the shares are, in fact, below par, the transaction is usurious. *Eagleton v. Shotwell,* 536
4. And if it be impossible to ascertain the cash value of the shares, the company having failed, the sale will be rescinded, and the mortgage taken by the lender ordered to stand as security only for the cash lent, and the interest thereon, *ib.*
5. A creditor is not allowed to make it a condition of a loan, that he shall receive a compensation for his services in procuring the money, as the allowing such a demand would have a tendency to usury and oppression, if it be not usury in itself. *Hine v. Handy,* 6

V

VENDOR AND PURCHASER.

1. A vendor has a lien on the estate sold for the purchase money, while the estate is in the hands of the vendee, and when there is no contract by which it may be implied that the *lien* was not intended to be reserved. *Garsom v. Green and others,* 306
2. *Prima facie*, the purchase money is a *lien*, and it lies on the vendee to show the contrary ; and the death of the vendee does not alter or defeat the lien, *ib.*
3. Nor does the taking a promissory note for the purchase money affect the lien ; and if part be paid, the lien is good for the residuum ; and the vendee is a

- trustee for what is unpaid. *Garrison v. Green and others*, 308
4. A *lis pendens*, duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree; and the pendency of the suit is deemed to commence from the service of the *subpoena*, after the bill is filed. *Murray & Winter v. Ballou & Hunt*, 566
5. If a purchaser has notice of a trust at the time of purchase, he himself becomes a trustee, notwithstanding the consideration he has paid, *ib.*
6. A purchaser of land buys at his peril, and is bound to look to the title and the competency of the vendor, *ib.*
7. A purchaser of land chargeable with constructive notice only, by means of a *lis pendens*, is not to be charged with costs, there being no actual fraud, though the purchase is set aside on the ground of the implied fraud, *ib.*

Notice to purchasers, *vide MORTGAGE*,
II. NOTICE.

Vide AGREEMENT, II. CONTRIBUTION, 6.

VOLUNTARY CONVEYANCE.

Vide AGREEMENT, I. DEED, I. 4. II.
13. 17. FRAUDULENT CONVEYANCES, 1, 2, 3, 4, 5, 6. NOTICE, 3.
SETTLEMENT, 2, 3, 4, 5.

W

WAR,

Not a ground for suspending the administration of justice, *vide MORTGAGE*, III. 18, 19.

WARD.

Vide GUARDIAN.

WASTE.

Vide INJUNCTION, I.

WILL.

1. S. being about to sail on a voyage to the *West Indies*, where he afterwards died, addressed a letter to M., containing the following clause: "A thousand accidents may occur to me, which might deprive my sisters of that protection which it would be my study to afford; and, in that event, I must beg, that you will attend to putting them in possession of two thirds of what I may be worth, appropriating one third to Miss C., and her child, in any manner that may appear most proper." This was held to be a valid will, especially after it had been proved as the last will of S., by the surrogate, and administration granted with the will annexed; and that C., and her son, were each entitled to a moiety of one third of the personal estate of the testator, in the hands of the administrator. *Morrell and others v. Dickey*, 153

2. Where a testator directed his real estate to be sold by his executors, and the proceeds to be put out at interest, on good security, and the interest to be annually paid, in equal proportion, to A., B., and C., and the survivors of them, without limitation of time, but was silent as to any further disposition as to the principal or residuum of his real estate; this was held to be a bequest of the principal as well as the interest; it

- being apparent, from the introductory, and other clauses in the will, that the testator did not intend to die intestate in that respect. *Earl and others v. Grim,* 494
3. The introductory part of the will has some effect in the construction of the subsequent devises; but the intention manifested in the introductory part, is not alone sufficient, without an actual devise. *S. C.* 498
4. But if it be apparent, from the introductory part, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause may include the whole, they are to be taken in the largest sense, in order to correspond with the introductory part, *ib.*
5. The words of a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would arise from such construction. *Roosevelt and others v. Thurman,* 220
6. Where the testator bequeathed to his wife, *all the rest, residue,*
- and remainder of the moneys belonging to his estate, at the time of his decease,* it was held that the word *moneys* must be understood, in its legal and popular sense, to mean gold and silver, or the lawful currency of the country, or bank notes, where they are known and used in the market as cash, or money deposited in bank for safe keeping; and not to comprehend promissory notes, bonds, and mortgages, or other securities; there being nothing in the will itself to show that the testator intended to use the word in that extended sense. *Mann and others v. Executors of Mann,* 231
7. *Plate* used in the family passes under a devise or conveyance of "household goods, or furniture." *Bunn and others v. Winthrop and others,* 329

Parol evidence to explain, &c. a will,
vide EVIDENCE, II. 3.

WITNESS.

Vide EVIDENCE. III.

END OF VOL. I.

E. J. A. A.





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